

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

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U. S. DEPT. OF JUSTICE

CLARENCE C. GILGUTH, JR. ATTORNEY GENERAL
THE STATE OF NORTH CAROLINA AND AS
MEMBER OF THE STATE CONSTITUTIONAL
OF THE STATE OF NORTH CAROLINA BY AN
LATE

THE GRAND JURY STATE GRAND JURY
HURLEY AND HARRY HURLEY

APPEAL FROM THE DISTRICT COURT TO THE SUPREME COURT
THE DISTRICT OF COLUMBIA

JANUARY 12, 1900

(35,165)

(25,143)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 860.

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL FOR
THE STATE OF SOUTH DAKOTA AND *EX OFFICIO*
MEMBER OF THE STATE SECURITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA, ET AL., APPEL-
LANTS,

vs.

THE SIOUX FALLS STOCK YARDS COMPANY, WILLIAM
MORLEY, AND HARRY MORLEY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF SOUTH DAKOTA.

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1 In the District Court of the United States for the District of South Dakota, Southern Division.

In Equity. No. 26.

SIOUX FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs and Appellees,
vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants and Appellants.

Citation on Appeal.

To the Sioux Falls Stock Yards Company, a Corporation; William Morley and Harry Morley, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, in the District of Columbia, on the 11th day of February, A. D. 1916, Pursuant to an order allowing an appeal filed and entered in the clerk's office of the district court of the United States, for the district of South Dakota, Southern Division, from an order signed, filed and entered on the 19th day of November, 1915, in that certain suit being in equity No. 26 So. Division, wherein you are plaintiffs, and Clarence C. Caldwell, as Attorney General for the State of South Dakota and ex Officio member of the State

2 Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota, and Ex-Officio member of the State Securities Commission of the State of South Dakota, Joseph L. Wingfield, as Public Examiner of the State of South Dakota, and Ex-Officio member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, are defendants and appellants, to show cause if any there be, why the order rendered against said appellants, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable James D. Elliott, United States District Judge for the district of South Dakota, this 13 day of December, 1915, and of the Independence of the United States, the One Hundred and thirty-ninth.

JAS. D. ELLIOTT.

U. S. District Judge for the District of South Dakota.

Due and legal service of the above citation on appeal is hereby admitted and accepted this 30th day of December, 1915.

GAMBLE, WAGNER & DANFORTH,
Attorneys for Plaintiffs.

3 [Endorsed:] #26 S. D. Equity. Filed December 31,
1915. Oliver S. Pendar, Clerk.

4 In the District Court of the United States for the District of
South Dakota, Southern Division.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM
MORLEY and HARRY MORLEY, Plaintiffs,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South
Dakota and ex Officio Member of the State Securities Commission
of the State of South Dakota; Harry O'Brien, as Insurance Com-
missioner of the State of South Dakota and ex Officio Member of
the State Securities Commission of the State of South Dakota;
Joseph L. Wingfield, as Public Examiner of the State of South
Dakota and ex Officio Member of the State Securities Commission,
and Dan E. Hanson, as State's Attorney of Turner County, South
Dakota, Defendants.

Be it remembered, that on the 3rd day of November, A. D. 1915,
there was filed in the above entitled Court, on behalf of the plain-
tiffs, a Bill of Complaint; which Bill of Complaint is in words and
figures following to-wit:

In the District Court of the United States for the District of South
Dakota, Southern Division.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM
MORLEY and HARRY MORLEY, Plaintiffs,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South
Dakota and ex Officio Member of the State Securities Commission
of the State of South Dakota; Harry O'Brien, as Insurance Com-
missioner of the State of South Dakota and ex Officio Member of
the State Securities Commission of the State of South Dakota;
Joseph L. Wingfield, as Public Examiner of the State of South
Dakota and ex Officio Member of the State Securities Commission,
and Dan E. Hanson, as State's Attorney of Turner County, South
Dakota, Defendants.

Bill of Complaint.

Sioux Falls Stock Yards Company, a corporation organized and
existing pursuant to the laws of the State of Colorado, and having
its principal place of business in the City of Denver in the
5 State of Colorado, and William Morley a resident and citizen
of the State of Sioux City in the County of Woodbury and

State of Iowa, and Harry Morley a resident and citizen of the City of Sioux City and State of Iowa, bring this bill of complaint against Clarence C. Caldwell, as Attorney General of the State of South Dakota, and a resident and citizen of Howard in the County of Miner and State of South Dakota, and as a member of the State Securities Commission by virtue of his office as Attorney General of said State, and against Harry O'Brien, as Insurance Commissioner of the State of South Dakota, and a member of the State Securities Commission by virtue of his office as Insurance Commissioner, a resident and citizen of the City of Highmore, in the County of Hyde and State of South Dakota, and against Joseph L. Wingfield, as Public Examiner, of the State of South Dakota, and member of the State Securities Commission by virtue of his office as Public Examiner, and a resident and citizen of Mitchell, County of Davison and State of South Dakota, and Dan E. Hanson, as State's Attorney of the County of Turner of the State of South Dakota, and a resident and citizen of Parker in the County of Turner and State of South Dakota.

1.

And thereupon your complainants complain and say that Clarence C. Caldwell is the Attorney General for the State of South Dakota, and a member of the State Securities Commission by virtue of his office as Attorney General; that Harry O'Brien is Insurance Commissioner of the State of South Dakota, and a member of the State Securities Commission of the State of South Dakota by virtue of his office as Insurance Commissioner, and that Joseph L. Wingfield ⁶ as Public Examiner of the State of South Dakota, and a member of said State Securities Commission by virtue of his office as Public Examiner, and that Dan E. Hanson is States Attorney of the County of Turner of the State of South Dakota.

2.

Your complainants further state that Chapter 275 of the Session Laws of the State of South Dakota for the year 1915 is as follows:

"Chapter 275.

(H. B. 158.)

Relating to the Securities Commission.

An Act Entitled An Act to Prevent Fraud in the Sale and Disposition of Stocks, Bonds or Other Securities Sold or Offered for Sale Within the State of South Dakota, Providing for the Enforcement Thereof, and Creating a State Securities Commission.

Be It Enacted by the Legislature of the State of South Dakota:

Sec. 1. There is hereby created a commission to be known as the State Securities Commission, hereafter referred to as "The Commission," whose duty it shall be to administer and provide for the en-

forcement of all the provisions of this Act. Said commission shall consist of the Public Examiner who shall be president thereof, the Attorney General of the State, and the Commissioner of Insurance all of whom shall be members of said commission during their terms of office and any two shall constitute a quorum. The said commission shall succeed the State Securities Commission, created

7 by Chapter 319, Session Laws of 1913, and as such successor shall receive all of the files, papers and property of said State Securities Commission. All proceedings pending before said State Securities Commission created by said Chapter 319, Session Laws of 1913, shall be continued by the commission created by this Act; all actions, civil and criminal, pending under said Chapter 319, Session Laws of 1913, shall be continued and completed thereunder. Said commission shall have its office in the Capitol, in the City of Pierre, in a room to be furnished and equipped by the state, and all of its records shall be there kept. It shall hold regular monthly meetings on such dates as may be determined by the Commission and may hold special meetings upon the call of the president; it shall keep a complete record of all its meetings, its accounts and the business it transacts, and may prepare all necessary blanks to be used in its proceedings and in the conduct of its business. The commission shall have the power to appoint a Secretary at a salary of eighteen hundred dollars per annum. The person so appointed shall proceed to qualify by subscribing the usual oath of office and by giving a bond to the State of South Dakota in the sum of five thousand dollars, with such surety as The Commission shall approve, conditioned upon the faithful performance of the duties of the office, which bond shall be filed and recorded as now provided by law for state officers. The Secretary when acting for the commission, shall have equal power and authority, subject to the approval of the commission and he shall attend to and perform any and all detail work relative to the commission. The commission shall

8 have power to employ such other and further assistance as may be necessary to carry out the provisions of this Act. Annually on or before the first day of November, the Commission shall prepare and file in the office of the Governor a report containing an accurate review of the work of the Commission for the fiscal year ending June 30th preceding the date of said report and which shall contain a schedule of permits granted, a schedule of applications rejected, a statement of the receipts and disbursements of the Commission and such other material information as relates to the work of the office.

Sec. 2. Every person, corporation, co-partnership, company or association (except those exempt under the provisions of this Act) organized, or which shall hereafter be organized in this state, whether incorporated or unincorporated, which shall either himself, themselves or itself or by or through other- engage in the business of selling or negotiating for the sale of any stocks, bonds, investment contracts or other securities issued by him, them or it within the State of South Dakota, shall be known for the purposes of this Act as a domestic investment company. Every such person, corporation, co-

partnership or association resident of or organized in any other State, territory or government, shall be known for the purposes of this Act as a foreign investment company.

Sec. 3. The provisions of this Act shall not apply to (a) Securities of the United States; or any foreign government or of any State or territory thereof, or of any county, city, township, district or other public taxing subdivision of any State or territory of the United States, or any foreign government. (b) Unsecured commercial paper; (c) Securities of public or quasi public corporations, the issue of which securities are regulated by the South Dakota Railroad Commission or by a public service commission or board of equal authority of any State or territory of the United States or securities senior thereto. (d) Securities of State or National Banks or Trust Companies, or building and loan associations of this State. (e) Securities of any domestic corporation organized without capital stock and not for pecuniary gain, or exclusively for educational, benevolent, charitable or reformatory purposes. (f) Mortgages upon real and personal property situated within this State where the entire mortgage is sold and transferred with the note or notes secured by such mortgages. (g) Increase of stock sold and issued to stockholders, also stock dividends. (h) Securities which are listed in any Standard Manual of information approved by said Commission. (i) Isolated or single transactions; Provided, however, that said Commission shall have the power to call for additional and further information than that contained in such Manuals with reference to any securities listed therein, and may, pending the filing of such information, suspend the sale of such securities, and also suspend, either temporarily or permanently, the sale of any securities listed in such Manuals after a hearing upon notice to the issues of such securities if said commission shall find that the sale of such securities would work a fraud upon the purchasers thereof. All permits granted by the commission created by Chapter 319, Session Laws of 1913, that shall be in full force and effect at this time shall remain in force subject to revocation by the state securities commission for cause, as provided by this Act.

Sec. 4. Before selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever in this state, any stocks, bonds, investments contracts, or other securities of its own issue every investment company domestic or foreign shall file in the office of the Commission a statement showing in full detail the plan upon which it proposes to transact business; a copy of all contracts, stocks, bonds or other instruments which it proposes to make with, or sell to, its contributors or customers, together with a copy of its prospectus, and of the proposed advertisements of its sale of stocks, bonds, investments contracts, or other securities, which statement shall also show the names and location and main office of the investment company; the names and addresses of its officers and an itemized account of its financial condition and the amount of its assets and liabilities, and such other information touching its conditions and affairs as the Commission may require. If such investment company shall be a co-partnership or an unin-

corporated association it shall also file *the* the Commission a copy of its articles of co-partnership or association, and all other papers pertaining to its organization. If it be a corporation organized under the laws of South Dakota, it shall also file with the Commission a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with the Commission a copy of the laws of the State, territory or government under which it exists or is incorporated, and also a copy of its Charter and the certificate of the proper officer of such State showing that it is authorized to transact business therein; and also copies of its constitution and by-laws, and all amendments of any of the above mentioned instruments which have been made, and all other papers pertaining to its organization. Every such investment company, foreign or domestic, shall at the time of filing the above named papers, pay a filing fee of one-tenth of one per cent

11 of the gross assets as shown by its financial statement. Provided, however, that such filing fee shall not be more than one hundred dollars, nor less than ten dollars.

Sec. 5. All of the above described papers shall be verified by the oath of a member of the co-partnership or company, if it be a co-partnership or company, and by the oath of a duly authorized officer, if it be a corporation or an unincorporated association. All such papers, however, as are recorded or are on file in any public office shall be further certified by the officer of whose records or archives they form a part, as being correct copies of such records or archives.

Sec. 6. Every foreign investment company before offering for sale any of its stocks, bonds, investment contracts, or other securities in this State shall also file its irrevocable written consent that suits and actions may be commenced against it in the proper court of any county in this State in which a cause of action may arise or in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this State, on the Public Examiner of the State of South Dakota, said consent stipulating and agreeing that such service of such process or pleading on such Public Examiner shall be taken and held in all courts to be as valid and binding as if due service had been made upon the company itself, and said instrument containing such consent shall be authenticated by the seal of said foreign investment company, and by the acknowledged signature of a member of the co-partnership or company, if it be a co-partnership or company; or by an acknowledged signature of the president and secretary of incorporated or unincorporated association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees or managers of the corporation or association, authorizing the secretary and president to execute the same. In case any process or pleadings

12 mentioned in this Act are served upon the Public Examiner of the State of South Dakota, it shall be by duplicate copies, one of which shall be filed in the office of the State Securities Commission and another immediately forwarded by registered mail to

the head office of the person or incorporation against which said process or pleadings are directed.

Sec. 7. Said application shall be heard by the said Commission at the next regular meeting after said application is filed (providing such filing shall precede such monthly meeting by twenty-four hours) or at a special meeting or adjourned meeting of said Commission, but if such application is heard at a special or adjourned meeting of said commission the Secretary shall give such applicant at least two days' notice of such hearing. Said Commission shall have power to adjourn such hearings upon such applications from day to day or from time to time.

Sec. 8. The said Commission shall have power to demand from any investment company seeking to come under the provisions of this Act any further information other than such investment company is required to furnish under the provisions of this Act which shall be necessary to the end that the Commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expenses of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and intangible assets.

13 Sec. 9. It shall be the duty of said Commission to examine the statements and documents filed in its office by any investment company and the reports of any investigation conducted under the direction of said commission and to hear such applicant and it shall have power to examine under oath any person interested or connected with such investment company, and if said commission finds that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds, investment contracts or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said commission work a fraud upon the purchaser, then said commission shall disapprove the sale of such proposed contracts, stocks, bonds or other securities and shall notify such investment company by registered mail of its findings and disapproval, and it shall be unlawful for such company to do any business in the way of selling, offering for sale, taking subscriptions for, or negotiating for the sale in any manner whatever of any such contracts, stocks, bonds, and other securities in this State; and said contracts, stocks, bonds and other securities shall not be sold in this State. If, however, said commission shall not find that the proposed plan of business of said investment company or that its proposed contracts, stocks, bonds or other securities are fraudulent or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of said Commission work a fraud upon the purchaser thereof, then it shall approve the sale of such stocks, bonds, contracts or other

securities in the State of South Dakota, and issue its certificate in substantially the following language:

14 "This is to certify that ——— had this date been given permission to sell \$—— of its — within the State of South Dakota.

Dated ———.

In Witness Whereof, I have hereunto affixed the corporate seal of the State Securities Commission.

[SEAL.]

———, *Secretary.*"

Sec. 10. Any person, firm, co-partnership, corporation or association whether domestic or foreign, not the issuer, who shall in this State sell or offer for sale any of the stocks, bonds, investment contracts of other securities issued by any foreign or domestic investment company, except the securities specifically exempted in this Act, or who shall be advertisement or otherwise profess to engage in the business of selling or offering for sale such securities shall be deemed a "dealer" in such securities within the meaning of this Act, and no dealer within the meaning of this Act shall sell or offer for sale any such securities unless and until he shall have filed a list of the same in the office of the State Securities Commission as in this Act provided. The term "dealer" shall not include an owner, nor issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who is a trust capacity created by law lawfully sells any securities embraced with such trust.

Sec. 11. Any dealer desiring to sell or offer for sale within this state any stocks, bonds, contracts or other securities not exempted under the terms of this Act, shall first register with the State Securities Commission and shall furnish said commission, upon oath, in such form as the commission shall prescribe, the following
15 information, to-wit: the dealer's name, residence and business address, the general character of the securities to be dealt in, the place or places where the business is to be conducted within this State, and where the business in this State is not to be conducted by the dealer in person, then the names and addresses of all the persons in charge thereof. Said dealer shall pay to the Commission a fee of fifty dollars and shall furnish said Commission with such other information in addition to that above specified as said Commission shall deem necessary in order to thoroughly acquaint such Commission with the character of the business of said dealer. All authorized agents of any dealer or investment company shall be registered with the Commission and the name of any agent shall be stricken from the register upon the written request of the dealer or investment company; provided, that no agent shall act as such until he shall have filed with the Commission a signed and acknowledged certificate of registration and acceptance of agency upon forms to be furnished by the Commission; Provided, also, that the Commission shall have authority to reject or cancel the registration and appointment of any person as agent for such cause as may to the Commission appear sufficient. If a dealer shall be a non-resident of the state or a cor-

poration other than a domestic corporation, he shall at the time he registers with the Commission file with the commission a written, duly authenticated, appointment of the Public Examiner of this State as his or its agent in South Dakota upon whom process or pleadings may be served for or on behalf of the dealer, which appointment shall be irrevocable. Upon compliance by such dealer with the provisions of this Act, the said Commission shall issue to such dealer a license under the seal of said Commission and signed by the Secretary thereof, which said license shall be good
 16 until revoked by said Commission for good cause upon notice to such dealer and a hearing duly had.

Sec. 12. In addition to the filing and examination fees herein provided for to be paid by investment companies and dealers, there shall be charged and collected by said commission a fee of three dollars for the registration and authorization of each agent of any such investment company or dealer, *with* which fee and registration shall entitle each agent to act as such until the first day of July, following, unless said authority is sooner revoked by the Commission or the dealer or investment company. Each of such agents shall make a new registration on July first of each year for the renewal of their agency and the Commission shall charge and collect for each such renewal registration, a fee of three dollars. All fees and charges collected by the Commission shall be covered into the State Treasury and credited to the State Securities Commission Fund, which is hereby appropriated to the use of the Commission toward paying the expenses of enforcing this act. The expenses of the Commission shall, however, be limited to the moneys received by it in fees. All expense actually and necessarily incurred by the Commission for salaries and expenses in carrying out the provisions of this act shall be paid by the State Treasurer upon warrants drawn from the State Securities Commission fund by the State auditor upon duly itemized and approved vouchers.

Sec. 13. General accounts of every investment company, domestic or foreign, shall be kept in a business like and intelligent manner and in sufficient detail that said Commission can ascertain at
 17 any time its financial condition and the books of accounts shall at all times during business hours, except on Sundays and legal holidays, be open to stockholders and investors in said company, and the said Commission, or its duly authorized representatives, and all such investment companies shall be subject to examination by said commission or any member thereof, or the clerks, accountants or examiners thereof, at any time said Commission shall deem it advisable, and in the same manner as it — now provided for the examination of state banks, and such investment shall pay a fee for each of such examinations of not to exceed ten dollars for each day or fraction thereof that any member of said Commission, clerk, accountant, or examiner is absent from the Capitol building for the purpose of making such examination and shall also pay the actual traveling and hotel expenses of the person or persons making such examination and the failure or refusal of any investment company

to pay such fees, upon demand of such commission, clerk, accountant, or examiner, while making such examination shall work a forfeiture of the right of such investment company to sell or offer for sale any of its contracts, stocks, bonds or other securities in this State. In case of a preliminary examination of any investment company by said Commission as to whether said company shall be permitted to come under the provisions of this Act, the fee of such examination shall be the same as in this section provided, and in case it shall be made to appear to the Commission from the examination of said investment company after said investment company has been authorized to sell its stocks, bonds, contracts, and securities that the further sale of said stocks, bonds, contracts and securities would work

18 a fraud upon the purchaser, then said commission may make an order revoking the license of said investment company to sell its stocks, bonds, contracts and securities, upon notice duly given and a hearing duly had any may, pending such hearing, suspend the right of said investment company to sell its stocks, bonds, contract and securities.

Sec. 14. It shall be unlawful for any investment company or dealer, or representative thereof, either directly or indirectly to sell or cause to be sold, offer for sale, take subscriptions for, or negotiate for the sale in any manner whatever in this State, any stocks, bonds, investment contracts or other securities (except as expressly exempted herein), unless and until said Commission has approved thereof and issued its certificate in accordance with the provisions of this Act, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statements and papers required to be filed by virtue of the provisions of this Act or the rules of the Commission. It shall be unlawful for any investment company or dealer, or its or his agents, to issue, circulate or deliver any advertisement, pamphlet, circular, prospectus or other document in regard to its stocks, bonds, contracts or other securities in the State of South Dakota differing in any way from the copy filed with said Commission as provided by this Act, nor until the same has been approved by the commission.

Sec. 15. No dealer within the meaning of this Act shall sell or offer for sale within this State any of the stocks, bonds, contracts or other securities of any investment company unless such company shall have fully complied with all the provisions of this Act, nor until said dealer shall have registered with the Commission, under the terms of this Act; Provided, however, that should any dealer desire
19 to sell or offer for sale within this State the stocks, bonds, contracts or other securities of an investment company, which has not itself, complied with the provisions of this Act said dealer shall make application to the said commission for license as hereinbefore provided for by investment companies and shall pay the same fee required to be paid by said investment company.

Sec. 16. The records of the Securities Commission shall be public records and it shall be the duty of the Commission to preserve such information and to so classify and arrange the same as to facilitate examination by any person affected by matters therein contained,

except that the Commission may, in its discretion, withhold information relating to the private affairs of persons or corporations when in their judgment the same shall not be required for the public welfare, or any information relative to any matter that may be at issue in any court, unless upon an order of court. The Commission may from time to time issue in pamphlet form, or by means of newspaper advertisements or otherwise, any and all information regarding any and all contracts, stocks, bonds or other securities sold or offered for sale within this State which it deems would be of public interest or advantage.

Sec. 17. Nothing in this Act shall be construed to repeal or modify any laws giving the State Banking Department of this State control of and supervision over State Banks, and the business of banking in this State, nor shall any part of this Act be construed to repeal or modify laws giving the Commissioner of Insurance of this State control of and supervision over the business of insurance in this State, and those engaged therein.

Sec. 18. The Commission shall adopt a seal with the words, "State Securities Commission," and such design as the Commission may prescribe, engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the Commission certified by the secretary thereof and authenticated by the Seal of said State Securities Commission shall be received in evidence in all courts equally and with like effect as the originals.

Sec. 19. Any person who shall knowingly and wilfully subscribe to or make or cause to be made any false statement, or false entry in any book of any investment company, or who shall exhibit any false paper with the intention or for the purpose of deceiving any person authorized to examine into the affairs of said investment company or shall make or publish any false statement of the financial condition of said investment company or false statement relating to the contracts, stocks, bonds, or other securities by it issued and offered for sale, shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided.

Sec. 20. The Commission shall provide for the furnishing to those who may apply therefor, of any information regarding any investment company or its affairs, which is on file in its office, except such as is withheld by the Commission under Section 16 of this Act, said Commission to charge therefor approximately the cost of preparing such information. The members of the Commission shall perform the duties imposed upon them and each of them, by the terms of this Act, without any compensation other than the salaries paid them by the State, but they shall be entitled to receive their actual and necessary expenses incurred when absent from the seat of government on business of the Commission.

Sec. 21. Every investment company, domestic or foreign, shall file during the month of January in each and every year a detailed statement in such form and containing such information as the commission shall require showing its condition at the close of business on the preceding December thirty-first, and shall at the same time pay a filing fee therefor of five dollars,

provided, that in cases where the nature of the business of the corporation makes it advisable in the opinion of the Commission, that the annual statement be made as of a different date than December 31st, the Commission may designate such other dates whereof an annual statement shall be made. Failure of any investment company to file its annual statement within one month after the date specified, or failure to file any special report that may be required by the Commission within thirty days, shall forfeit its permit to sell securities in the state unless an extension of time is granted by the Commission.

Sec. 22. The Supreme Court upon petition of any person aggrieved may review by certiorari any final order of determination of the Commission. The issuance of the writ shall not, however, unless specifically ordered by the Court, operate as a stay of proceedings.

Sec. 23. Any person or persons who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars or shall be imprisoned in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the Court.

Sec. 24. Should the courts of this state declare any section or provision of this act unconstitutional or unauthorized or in conflict with any other section or provision of this Act, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this act.

22 Sec. 25. Chapter 319, Sessions Laws of 1913, and all acts or parts of acts in conflict herewith are hereby repealed.
Approved March 15th, 1915.

3.

That said Chapter 275 of the Session Laws of the State of South Dakota for the year 1915 became effective in the State of South Dakota on the 1st day of July, 1915.

4.

That the plaintiff the Sioux Falls Stock Yards Company at and prior to said 1st day of July, 1915, and at all the times hereinafter mentioned was engaged in the business of building and constructing a stock yards, and especially engaged in the business of building and constructing a stock yards in the City of Sioux Falls, County of Minnehaha and State of South Dakota, and now has several acres of pens and yards constructed and built upon land in the City of Sioux Falls, County of Minnehaha, and State of South Dakota, and was also engaged at the times hereinafter mentioned in selling a certain amount of its capital stock for the purpose of raising sufficient capital to complete the construction of its said stock yards in said City of Sioux Falls, Minnehaha County, South Dakota; and that the complainants, William Morley and Harry Morley were

at all of said times also engaged in the business of selling stock and especially engaged in the business of selling the stock of the Sioux Falls Stock Yards Company, and that such sales were being made to various farmers, and other purchasers who wished to buy the stock of the Sioux Falls Stock Yards Company for the purpose of promoting the business of the said Sioux Falls Stock Yards

23 Company, and for the purpose of creating a market for stock in the State of South Dakota, and that the complainant now has invested and had invested at the times hereinafter mentioned, several thousand dollars in said enterprise, and that it is still necessary for the Sioux Falls Stock Yards Company to continue the sale of its capital stock in order to complete and build said stock yards, and that it is necessary that said William Morley and Harry Morley continue the sale of said stock for the purpose of earning their livelihood and for the purpose of assisting the Sioux Falls Stock Yards Company in the promotion of its legitimate enterprise.

5.

That the said Sioux Falls Stock Yards Company, and the said William Morley and Harry Morley, as aforesaid, in the months of July and August, 1915, were so engaged in the sale of the stock to various farmers, and others who wished to purchase in the State of South Dakota, and still desire to sell such stock to such purchasers within the State of South Dakota, and that the said Sioux Falls Stock Yards Company, and the said William Morley and Harry Morley still desire to continue the sale of the valuable securities and stocks of the said Sioux Falls Stock Yards Company for the purpose of promoting a legal and lawful business, and that said business cannot be promoted without the continued sale of stock of said corporation.

6.

That on or about the 19th day of October, 1915, the defendant, Dan E. Hanson, as State's Attorney of the County of Turner and State of South Dakota at the instigation and request of the other defendants, as members of the said State Securities Commission as provided in said Chapter 275 of the Session Laws of the State of South Dakota for the year 1915, caused to be filed in the
24 Circuit Court of the County of Turner in the State of South Dakota six informations against your complainants charging your complainants with violation of the provisions of said Chapter 275 of the Session Laws of the State of South Dakota for the year 1915, copies of which criminal informations are hereunto attached and made a part hereof and Marked Exhibits 1, 2, 3, 4, 5, and 6, and that the defendants and each of them now give out that they intend to prosecute your complainants under said informations in said criminal actions in said Turner County in the State of South Dakota, and have notified counsel for complainants that complainants will be prosecuted at once under said informations, and that complainants will be further prosecuted, and that the prosecution

of complainants will continue so long as complainants sell or offer for sale any stock of the said Sioux Falls Stock Yards Company with the State of South Dakota.

7.

That the effect of said action is to deprive the complainants herein of their rights of property, and without due process of law, and is to deprive the complainants Harry Morley and William Morley from pursuing a lawful business, and depriving them of the opportunity of earning a livelihood and of the right to contract, and does deprive the said Sioux Falls Stock Yards Company of its right to contract, and of its property rights, and does deprive them of further completing and building a stock yards in the City of Sioux Falls, and its effect is to prevent them from raising a sufficient amount of capital to complete its business, and from pursuing a lawful business; that if said defendants are permitted to pursue said prosecutions and further prosecutions, as threatened, 25 that it will deprive the complainants of their property without due process of law, and cause complainants to suffer great and irreparable injury, and that complainants have no plain, speedy and adequate remedy at law.

8.

That this action involves a Federal question in that Chapter 275 of the Session Laws of the State of South Dakota for 1915, is unconstitutional and void, in that it deprives complainants of the right to sell in the State of South Dakota the capital stock of said Sioux Falls Stock Yards Company, and deprives them of their property without due process of law, as required by Section 1 of Art. 14 of the Constitution of the United States, and Sec. 2 of Art. VI of the Constitution of the State of South Dakota; that it denies to the complainants, and each of them, the equal protection of the laws as guaranteed to them under the Fourteenth Amendment to the Federal Constitution; that it imposes a burden and practically amounts to prohibition of Interstate Commerce, contrary to Sec. 8 of Art. 1 of the Constitution of the United States, and that it attempts to vest and delegate to the said so called State Securities Commission judicial powers unauthorized by law.

9.

That the said Sioux Falls Stock Yards Company has complied with the provisions of the laws of the State of South Dakota in regard to foreign corporations, and has been duly authorized by the said state of South Dakota to do business in the State of South Dakota as a foreign corporation.

Wherefore, your complainants pray that defendants and each of them, be restrained from further violating the rights of your com-

26 plainants, and that your Honor grant a writ of injunction perpetually enjoining the said defendants from further prosecuting said criminal actions hereinbefore referred to, and from instituting further criminal actions against your complainants for alleged violation of said unconstitutional law, and from further interfering with the rights of your complainants, and your complainants further pray that a provisional or temporary injunction be issued herein restraining said defendants, and each of them from further prosecuting said action hereinbefore referred to and restraining and enjoining them from further prosecuting your complainants for other alleged violation of said law, and from instituting any further criminal actions under said law, against your complainants; your complainants further pray that a temporary restraining order be issued restraining defendants from prosecuting said criminal action in said Turner County, South Dakota, until the hearing in this matter as to why a temporary injunction should not issue in this matter, and for such other and further relief as the equity of the case may require.

ROBERT J. GAMBLE,
EDWARD E. WAGNER,
GEORGE J. DANFORTH,
Attorneys for Complainants.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

George J. Danforth, being first duly sworn on oath states, that he is one of the attorneys for the complainants in the above entitled action, and that he has read the above and foregoing complaint and knows the contents thereof; that the same is true according
27 to his best knowledge, information and belief, and that the reason this verification is not made by the complainants herein personally, is because the complainants are all non-residents of the State of South Dakota, and are not now in said state of South Dakota where this verification is made; that the plaintiff, the Sioux Falls Stock Yards Company, is a corporation and that none of its officers are within the State of South Dakota, and that there is no one within the State of South Dakota to make this verification in behalf of the complainants herein; that affiant has been duly authorized by the complainants herein to make said verification, and that it is necessary that said verification be made at once in order to restrain and enjoin the prosecution of said criminal actions.

GEORGE J. DANFORTH.

Subscribed and sworn to before me this 29th day of October,
A. D. 1915.

[NOTARIAL SEAL.]

MARIE MONTGOMERY,
Notary Public, South Dakota.

28

EXHIBIT 1.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit, October Term, A. D. 1915.

STATE OF SOUTH DAKOTA

vs.

WILLIAM MORLEY.

Information.

The State's Attorney within and for the County of Turner within the First Judicial Circuit of the State of South Dakota, as informant, in the name and by the authority of the State of South Dakota, upon his oath presents and charges:

That, William Morley, late of said County, yeoman, on the 6th day of August in the year of our Lord One Thousand Nine Hundred and Fifteen within the County of Turner and State of South Dakota, did act as agent of the Sioux Falls Stock Yards Co., for the sale of stock in the said Sioux Falls Stock Yards Co., without having filed with the State Securities Commission a signed and acknowledged certificate of registration and an acceptance of agency, the said Sioux Falls Stock Yards Co., being then and there a foreign investment company within the meaning of Chapter 275 of the Session Laws of 1915, of South Dakota, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of South Dakota.

DAN E. HANSON,

States Attorney of the County of Turner, South Dakota.

29

STATE OF SOUTH DAKOTA,
County of Turner, ss:

Dan E. Hanson being duly sworn, upon his oath states that he is the State's Attorney of the County of Turner in the State of South Dakota, that he has read the foregoing information, by him made, as informant, and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information and belief.

DAN E. HANSON.

Subscribed and sworn to before me this 18 day of October, 1915.

[SEAL.]

JOHN J. GERING,

Clerk of Courts.

Witnesses known to State's Attorney at time of filing this information: G. H. Hurd, C. E. Sanborn, J. W. Parsons, Andrew Christensen, Martin Christensen, Harry Levison, Andrew Levison, Fred Peterson.

EXHIBIT 2.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit, October Term, A. D. 1915.

STATE OF SOUTH DAKOTA

vs.

HARRY MORLEY.

Information.

Information for Illegal Sale of Capital Stock of Corporation.

The State's Attorney within and for the County of Turner within the First Judicial Circuit of the State of South Dakota, as
30 informant, in the name and by the authority of the State of South Dakota, upon his oath presents and charges:

That Harry Morley, late of said County, yeoman, on the 30th day of July in the year of our Lord One Thousand Nine Hundred and Fifteen within the County of Turner and State of South Dakota, did then and there knowingly, wilfully and unlawfully offer for sale to one J. W. Parsons a certain quantity of the capital stock of the Sioux Falls Stock Yards Co., that said Sioux Falls Stock Yards Co., was then and there a private corporation and a foreign investment company, within the meaning of Chapter 275 of the Session Laws of South Dakota of 1915; that at said time and place the said Harry Morley was a representative of the said Sioux Falls Stock Yards Co., and offered to sell said stock as such representative; that on said date the said Sioux Falls Stock Yards Company had not made its application to the State Securities Commission of the State of South Dakota and secured the approval of said Commission to such offer to sell such stock and that said Commission had not on said date issued its certificate to the said Sioux Falls Stock Yards Company to sell its capital stock within this state; that said offer of sale of said capital stock made as aforesaid was not an isolated transaction but was part of a general business in this state in which the said defendant was then engaged; contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of South Dakota.

DAN E. HANSON,
*State's Attorney for the County
of Turner, South Dakota.*

STATE OF SOUTH DAKOTA,
County of Turner, ss:

Dan E. Hanson being duly sworn, upon his oath states that he is the State's Attorney of the County of Turner in the State of

South Dakota, that he has read the foregoing information,
31 by him made, as informant, and knows the contents thereof,
and that the statements therein made are true to the best of
his knowledge, information and belief.

DAN E. HANSON.

Subscribed and sworn to before me this 18 day of October, 1915.

[SEAL.]

JOHN J. GERING,
Clerk of Courts.

Witnesses known to State's Attorney at time of filing this information: J. W. Parsons, G. H. Hurd, Andrew Christensen, C. E. Sanborn, Joe Rooth.

EXHIBIT 3.

STATE OF SOUTH DAKOTA,

County of Turner, ss:

In Circuit Court, First Judicial Circuit, October Term, A. D. 1915.

STATE OF SOUTH DAKOTA

vs.

SIoux FALLS STOCK YARDS COMPANY, a Corporation.

Information.

Information for Illegally Selling Capital Stock.

The State's Attorney within and for the County of Turner within the First Judicial Circuit of the State of South Dakota, as informant, in the name and by the authority of the state of South
32 Dakota, upon his oath presents and charges:

That on the 8th day of July, 1915, the above named defendant the Sioux Falls Stock Yards Company was a corporation duly organized and existing under and by virtue of the laws of the state of Colorado, and theretofore and on or about April 14th, 1915, the said corporation had duly filed in the office of the secretary of state of this state a copy of its article of incorporation and had appointed a resident agent within this state, and had caused to be filed and recorded in the office of the secretary of state and in the office of the register of deeds of the county wherein said agent resides and resided, a copy of the appointment of said agent, and by virtue thereof the said corporation became and ever since has been and now is duly and legally authorized to do business in this state; and that said defendant corporation was on said 8th day of July 1915 and prior thereto a foreign investment company within the provisions of chapter 275 of the session laws of 1915; that on or about said 8th day of July 1915 the said Sioux Falls Stock-yards Company, the defendant above named did commit the crime of selling and offering for sale its capital stock within said Turner

County, without a license or certificate of permission from the State Securities Commission of this state, committed as follows: that on or about said 8th day of July 1915, at said Turner County the said defendant the Sioux Falls Stock-yards Company did knowingly, willfully and unlawfully sell and offer for sale ten shares of its capital stock to one Andrew Christianson of said Turner County for the sum of \$100.00 without having the approval or certificate from the State Securities Commission of this state permitting said

33 sale, the said Sioux Falls Stock-yards Company not being exempt by law from procuring the approval or certificate of the said State Securities Commission permitting said sale and which said sale was not an isolated or single transaction, but was one of a series of continued and successive sales of a similar nature, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of South Dakota.

DAN E. HANSON,

State's Attorney for the County of Turner, South Dakota.

STATE OF SOUTH DAKOTA,

County of Turner, ss:

Dan E. Hanson being duly sworn, upon his oath states that he is the State's Attorney of the County of Turner in the State of South Dakota, that he has read the foregoing information by him made, as informant, and knows *that* contents thereof, and that the statements therein made are true to the best of his knowledge, information and belief.

DAN E. HANSON.

Subscribed and sworn to before me this 18 day of October, 1915.

[SEAL.]

JOHN J. GERING,

Clerk of Courts.

Witnesses known to State's Attorney at time of filing this information: Andrew Christianson, Henry Larson, Joe Rooth, Andrew Peirson, J. A. Jensen.

34

EXHIBIT 4.

STATE OF SOUTH DAKOTA,

County of Turner, ss:

In Circuit Court, First Judicial Circuit, October Term, A. D. 1915.

STATE OF SOUTH DAKOTA

vs.

WILLIAM MORLEY.

Information.

The State's Attorney within and for the County of Turner within the First Judicial Circuit of the State of South Dakota, as inform-

ant, in the name and by the authority of the State of South Dakota, upon his oath presents and charges:

That, William Morley, late of said County, yeoman, on the 12th day of July in the year of our Lord One Thousand Nine Hundred and Fifteen within the County of Turner and State of South Dakota, did commit the crime of offering for sale capital stock of a foreign corporation contrary to Chapter 275 of Session Laws of 1915 of South Dakota, as follows: That on the 12th day of July, 1915, at Hurley in the County of Turner, State of South Dakota, the said William Morley did knowingly, willfully and unlawfully offer for sale to one C. E. Sanborn a certain quantity of the capital stock of the Sioux Falls Stock Yards Company, to-wit: certain shares of said stock; that said Sioux Falls Stock-yards Company was on said date a private corporation organized and existing within the State of Colorado and a foreign investment company doing business within this state; that in said county of Turner on said 12th day of July, 1915, the said William Morley was a representative of said corporation and offered for sale said stock as such representative; and that on said date the said Sioux Falls Stock-yards

35 Company had nor made its application to the State Securities Commission of this state and secured the approval of said Commission to said sale, and that said commission had not on said date issued its certificate to said Sioux Falls Stock-yards Company authorizing and permitting said company to sell its capital stock within the state of South Dakota; that said sale of capital stock made, offered and negotiated by the said William Morley as aforesaid was not an isolated transaction, but was part of a general business in which the said William Morley was then and there engaged; contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of South Dakota.

DAN E. HANSON,

State's Attorney of the County of Turner, South Dakota.

STATE OF SOUTH DAKOTA,

County of Turner, ss:

Dan E. Hanson being duly sworn, upon his oath states that he is the State's Attorney of the County of Turner in the State of South Dakota, that he has read the foregoing information, by him made, as informant, and knows the contents thereof, and that the statements therein made are true to his best knowledge, information and belief.

DAN E. HANSON.

Subscribed and sworn to before me this 18 day of October, 1915.

[SEAL.]

JOHN J. GERING,

Clerk of Courts.

36 Witnesses known to State's Attorney at time of filing this information: C. E. Sanborn, J. W. Parsons, Martin Christensen, Andrew Levison, Henry Levison, Joe Rooth, Andrew Christenson, Fred Peterson.

EXHIBIT 5.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit, October Term, A. D. 1915.

STATE OF SOUTH DAKOTA

vs.

HARRY MORLEY.

Information.

The State's Attorney within and for the County of Turner within the First Judicial Circuit of the State of South Dakota, as informant, in the name and by the authority of the State of South Dakota, upon his oath presents a and charges:

That, Harry Morley, late of said County, yeoman, on the 6th day of July in the year of our Lord One Thousand Nine Hundred and Fifteen within the County of Turner and State of South Dakota, did commit the crime of an illegal sale of corporation stock as follows: That the said Harry Morley on the 6th day of July, A. D., 1915, in the County of Turner and State of South Dakota, did then and there knowingly, wilfully and unlawfully offer for sale, sell and negotiate for the sale to one Joe Rooth a certain quantity of the capital stock of the Sioux Falls Stock Yards Company, to-wit: ten shares of said stock that said Sioux Falls Stock Yards Company was on said date a private corporation and a foreign investment company within the meaning of chapter 275 of the Session Laws of

South Dakota of 1915; that at said time and place the said
37 Harry Morley was a representative of said corporation and sold said stock as such representative; and that on said date the said Sioux Falls Stock Yards Company had not made its application to the State Securities Commission of this State and secured the approval of said Commission to said sale, and that said commission had not on said date issued its certificate to said Sioux Falls Stock Yards Company authorizing and permitting said company to sell its capital stock within the State of South Dakota; that said sale of said capital stock made, offered and negotiated by the said Harry Morley as aforesaid was not an isolated transaction, but was part of a general business in which the said Harry Morley was then and there engaged, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of South Dakota.

DAN E. HANSON,
State's Attorney of the County
of Turner, South Dakota.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

Dan Hanson being duly sworn, upon his oath states that he is the State's Attorney of the County of Turner in the State of South Dakota, that he has read the foregoing information, by him made, as informant, and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information and belief.

DAN E. HANSON.

Subscribed and sworn to before me this 18 day of October, 1915.

JOHN J. GERING,
Clerk of Courts.

38 Witnesses known to State's Attorney at time of filing this information: Joe Rooth, Andrew Christensen, Fred Peterson, Henry Levison, Andrew Levison, J. A. Jensen.

EXHIBIT 6.

STATE OF SOUTH DAKOTA,
County of Turner, ss:

In Circuit Court, First Judicial Circuit, October Term, A. D. 1915.

STATE OF SOUTH DAKOTA

VS.

HARRY MORLEY.

Information.

Information for Illegal Sale of Corporate Stock.

The State's Attorney within and for the County of Turner within the First Judicial Circuit of the State of South Dakota, as informant, in the name and by the authority of the State of South Dakota, upon his oath presents and charges:

That, Harry Morley, late of said County, *yoeman*, on the 6th day of July in the year of our Lord One Thousand Nine Hundred and Fifteen within the County of Turner, *State of South Dakota* and State of South Dakota did knowingly, wilfully and unlawfully sell, offer for sale and negotiate for the sale of to one Joe Rooth a certain quantity of the capital stock of the Sioux Falls Stock Yards Company, to-wit: Ten shares of said stock, that said Sioux Falls Stock Yards Company was on said date a private corporation organized and existing within the state of Colorado for the purpose of owning and operating a packing house and stock-yards within this state; that in said County of Turner on said 6th day of July, 1915, the said Harry Morley was a representative of said corporation, and also a

39 representative of R. A. Brachvogel & Co., a dealer in the securities of said corporation and then and there offered for sale and sold said stock as a representative of said Sioux Falls Stock Yards Company and also of said R. A. Brachvogel & Co., and that on said date neither the said Sioux Falls Stock Yards Company nor the said R. A. Brachvogel & Co. had made its application to the State Securities Commission of this state and secured the approval of said Commission to said sale, and that said Commission had not on said date issued its certificate authorizing and permitting the sale of the capital stock or other securities of said Sioux Falls Stock Yards Company, in this state; that said sale of said capital stock made, offered and negotiated by the said Harry Morley as aforesaid was not an isolated transaction, but was part of a general business in which the said Harry Morley was then and there engaged; contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of South Dakota.

DAN E. HANSON,

State's Attorney of the County of Turner, South Dakota.

STATE OF SOUTH DAKOTA,

County of Turner, ss:

Dan E. Hanson, being duly sworn, upon his oath states that he is the State's Attorney for the County of Turner in the State of South Dakota, that he has read the foregoing information, by him made, as informant, and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information and belief.

DAN E. HANSON.

Subscribed and sworn to before me on this 18th day of October, 1915.

[SEAL.]

JOHN J. GERING,
Clerk of Courts.

40 Witnesses known to State's Attorney at time of filing this information: Joe Rooth, Andrew Christensen, Andrew Levison, Henry Levison, J. A. Jensen, Martin Christensen, K. P. Mellgaard, J. D. Wingfield.

(Endorsed:) #753 S. D. District Court United States, District of South Dakota, Southern Division—Sioux Falls Stock Yards Company, a corporation, et al., Plaintiff—vs. Clarence C. Caldwell, as Attorney General, et al., Defendant—Bill of Complaint—Gamble, Wagner & Danforth, Attorneys for Plaintiffs, Sioux Falls, South Dakota—Filed November 3, 1915, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

“And on the same day there was issued out of the office of the Clerk of said Court a Summons; which said Summons, together with the Marshal's return of service thereon, is in words and figures following, to-wit:

Summons for Relief.

UNITED STATES OF AMERICA,
Southern Division of the District of South Dakota:

In the District Court of the United States for the District of South
Dakota.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM
MORLEY and HARRY MORLEY, Plaintiffs,
against

CLARENCE C. CALDWELL, as Attorney General for the State of South
Dakota and ex Officio Member of the State Securities Commission
of the State of South Dakota; Harry O'Brien, as Insurance Com-
missioner of the State of South Dakota and ex Officio Member of
the — State of South Dakota; Joseph L. Wingfield, as Public Ex-
aminer of the State of South Dakota and ex Officio Member of the
State Securities Commission, and Dan E. Hanson, as State's Attor-
ney of Turner County, South Dakota, Defendants.

Summons.

41 The President of the United States of America to the De-
fendants above named, Greeting:

You are hereby summoned and required to answer the complaint
of the Plaintiffs, in the above entitled action, which is filed in the
office of the Clerk of this Court in Sioux Falls, County of Minnehaha,
and State of South Dakota, and to file your answer to the said com-
plaint in said Clerk's office within thirty days after the service of
this summons upon you, exclusive of the day of such service; and if
you fail to answer the said complaint within the time aforesaid, the
Plaintiff in this action will apply to the Court for the relief de-
manded in the Complaint.

For the Marshal of the District of South Dakota to execute.

Witness: The Hon. James D. Elliott, Judge of the District Court
of the United States of America, this 3rd day of November, A. D.
1915. Issued at my office in the city of Sioux Falls under the seal
of said District Court, the day and year last aforesaid.

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk*,
By C. C. SCHWARZ, *Deputy*.

GAMBLE, WAGNER & DANFORTH,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Summons came into
my hands for service on the 11th day of November, A. D. 1915, and
that I served the same; together with the Complaint in said action,

42 on the therein-named defendant, Joseph L. Wingfield, as Public Examiner of the State of South Dakota and Ex-officio member of the State Securities Commission of the State of South Dakota, at 2 miles south of Harrisburg, South Dakota, on November 12, 1915, by handing to and leaving with him certified copies thereof.

Dated at Sioux Falls, South Dakota, this 12th day of November, A. D. 1915.

THOS. W. TAUBMAN,
United States Marshal,
By N. H. JENSEN, *Deputy.*

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Summons came into my hands for service on the 11th day of November, A. D. 1915, and that I served the same; together with the Complaint in said action, on the therein-named defendant, Clarence C. Caldwell, as Attorney General for the State of South Dakota and Ex-Officio member of the State Securities Commission of the State of South Dakota, at Howard, South Dakota, on the 12th day of November, 1915, by handing to and leaving with him certified copies thereof.

Dated at Sioux Falls, South Dakota, this 12th day of November, A. D. 1915.

THOS. W. TAUBMAN,
United States Marshal,
By E. J. ANDERSON, *Deputy.*

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Summons came into my hands for service on the 11th day of November, A. D. 1915, and that I served the same; together with the Complaint in said action, on the therein-named defendant, Harry O'Brien, as

43 Insurance Commissioner of the State of South Dakota and Ex-Officio member of the State Securities Commission of the State of South Dakota, at Pierre, South Dakota, on the 12th day of November, A. D. 1915, by handing to and leaving with M. E. Lockhart, his Clerk, in his office at Pierre, South Dakota, certified copies thereof.

Dated at Sioux Falls, South Dakota, this 16th day of November, A. D. 1915.

THOS. W. TAUBMAN,
United States Marshal.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Summons came into my hands for service on the 12th day of November, A. D.

1915, and that I served the same; together with the Complaint in said action, on the therein named defendant, Dan E. Hanson as State's Attorney of Turner County, South Dakota, at Parker, South Dakota, on the 12th day of November 1915, by handing to and leaving with him certified copies thereof.

THOS. W. TAUBMAN,
United States Marshal,
 By WILLIAM HICKEY, *Deputy.*

(Endorsed:) United States District Court, District of South Dakota, Southern Division—No. 753 S. D.—Sioux Falls Stock Yards Company, a corporation, et al., Plaintiffs, vs. Clarence C. Caldwell, as Attorney General for the State of South Dakota and Ex-Officio member of the State Securities Commission of the State of South Dakota, et al., Defendants. Summons for Relief.—Returned
 44 and filed this 11th day of November, 1915, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And, afterwards, to-wit: on November 3, 1915 there was filed in the Office of the Clerk of said Court an Order to Show Cause why a Temporary Injunction should not issue; which order, together with the Marshal's return of service thereon, is in words and figures following, to-wit:

In the District Court of the United States for the District of South Dakota, Southern Division.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and Ex-officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota, and Ex-officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and Ex-officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants.

Order.

Upon reading and filing the bill of complaint in the above entitled action, and upon motion of Gamble, Wagner & Danforth, attorneys for the complainants herein, it is ordered that the defendants and each of them show cause before this Court at the Court Room of said Court in the Federal Building in the City of Sioux Falls, Minnehaha County, South Dakota, at such time to be fixed by the presiding Judge of this Circuit, why a temporary injunction should not issue in the above entitled matter as prayed for by the complainants in said action, and it is further ordered that until a hearing upon

45 this order to show cause as to why a temporary injunction should not issue in said matter, that the defendants and each of them be and they hereby are restrained and enjoined from prosecuting the criminal actions mentioned and referred to in complainant's complaint in the County of Turner and State of South Dakota, and that a copy of this order, together with a copy of said bill of complaint in this action be served upon each of said defendants, and Frank M. Byrne, Governor of South Dakota, at least five days before the date of hearing thereof fixed by the Presiding Judge, as aforesaid.

Dated at Sioux Falls, South Dakota, this 29th day of October, A. D. 1915.

By the Court:

JAS. D. ELLIOTT, *Judge.*

Attest:

OLIVER S. PENDAR, *Clerk.*

By C. C. SCHWARZ, *Deputy.*

[SEAL OF COURT.]

UNITED STATES OF AMERICA,
District of South Dakota, sss

I hereby certify and return that the within Restraining Order came into my hands for service on the 11th day of November, A. D. 1915, and that I served the same on the therein-named Joseph L. Wingfield, as Public Examiner of the State of South Dakota and Ex-Officio member of the State Securities Commission of the State of South Dakota, at 2 miles south of Harrisburg, South Dakota, on the 12th day of November, A. D. 1915, by handing to and leaving with him a certified copy thereof.

Dated at Sioux Falls, South Dakota, this 12th day of November, A. D. 1915.

THOS. W. TAUBMAN,

United States Marshal,

46

By N. H. JENSEN, *Deputy.*

Filed November 17, 1915. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Restraining Order came into my hands for service on the 11th day of November, A. D. 1915, and that I served the same on the therein-named defendant, Clarence C. Caldwell, as Attorney General for the State of South Dakota and Ex-officio member of the State Securities Commission of the State of South Dakota, at Howard, South Dakota, on the 12th day of November, A. D. 1915, by handing to and leaving with him a certified copy thereof.

THOS. W. TAUBMAN,

United States Marshal,

By E. J. ANDERSON, *Deputy.*

Filed November 17, 1915. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Restraining Order came into my hands for service on the 11th day of November, A. D. 1915, and that I served the same on the therein-named defendant, Harry O'Brien, as Insurance Commissioner of the State of South Dakota and Ex-Officio member of the State Securities Commission of the State of South Dakota, at Pierre, South Dakota, on the 12th day of November, A. D. 1915, by handing to and leaving with M. E. Lockhart, his Clerk in his office at Pierre, South Dakota, a certified copy thereof.

Dated at Sioux Falls, South Dakota, this 16th day of November, A. D. 1915.

THOS. W. TAUBMAN,
United States Marshal.

Filed November 17, 1915. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Restraining Order came into my hands for service on the 11th day of November, A. D. 1915, and that I served the same on the therein-named Frank M. Byrne, Governor of the State of South Dakota at Pierre, South Dakota, on the 12th day of November, A. D. 1915, by handing to and leaving with him a certified copy thereof.

Dated at Sioux Falls, South Dakota, this 16th day of November, A. D. 1915.

THOS. W. TAUBMAN,
United States Marshal.

Filed November 17, 1915. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

48 UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that the within Restraining Order came into my hands for service on the 12th day of November, A. D. 1915, and that I served the same on the therein named defendant, Dan E. Hanson, as State's Attorney of Turner County, South Dakota, at Parker, South Dakota, on the 12th day of November, A. D. 1915, by handing to and leaving with him a certified copy thereof.

THOS. W. TAUBMAN,
United States Marshal,
By WILLIAM HICKEY, *Deputy.*

Filed November 17, 1915. Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

(Endorsed:) #753 S. D.—District Court of the United States, District of South Dakota, Southern Division—Sioux Falls Stock Yards Company, a corporation, et al., Plaintiff vs. Clarence C. Caldwell, as Attorney General, et al., Defendant—Order—Gamble, Wagner & Danforth, Attorneys for Plaintiffs, Sioux Falls, South Dakota—Filed November 3, 1915, Oliver S. Pendar, Clerk, By C. C. Schwarz, Deputy.

49 And on the same day there was filed in the Office of the Clerk of said Court, an Answer of said defendants; which Answer is in words and figures following, to-wit:

UNITED STATES OF AMERICA,
Southern Division of the District of South Dakota:

In the District Court of the United States for the District of South Dakota.

SIOUX FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiff,
against

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota, and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants.

Answer.

The defendants in the above entitled action submit the following in answer to plaintiff's bill of complaint herein:

50 **First.**

Defendants admit all of the allegations in said bill of complaint contained save and except those contained in paragraphs 7 and 8 of said bill of complaint, which paragraphs and each of them, the defendants respectfully deny.

Second.

As a further and affirmative defense these defendants allege upon information and belief that Chapter 275 of the Session Laws of the State of South Dakota of 1915, set out in said bill of complaint, is a valid and subsisting statute of the State of South Dakota and

authorizes and demands of these defendants that they do and perform the various acts against which plaintiffs complain in this action.

Third.

Further answering said bill of complaint defendants allege that plaintiffs have a plain, speedy and adequate remedy at law against the wrongs of which plaintiffs complain in that if the statute of which the plaintiffs complain is unconstitutional as alleged in said complaint, that fact would constitute a legal defense to the prosecutions mentioned in said complaint and could be established as such in the criminal actions mentioned, or in any other actions which might be brought against said plaintiffs.

51

Fourth.

Defendants still further answering said bill of complaint respectfully allege that this court is without jurisdiction to grant an injunction herein for the reason that this is in fact and legal effect a suit against the state of South Dakota, and therefore in violation of the eleventh amendment to the Constitution of the United States.

Fifth.

The defendants still further answering said Bill of Complaint allege that: the plaintiffs herein and each and all of them have appeared in the Circuit Court of Turner County, South Dakota in an action there pending as set out in said bill of complaint, and in said actions there pending against the said William Morley and Harry Morley, have filed demurrers, raising the question as to the constitutionality of the statute that is involved in this action, and in the action against the Sioux Falls Stock Yards Company, that a motion to quash has been filed; that these appearances, the filing of demurrers and the motion to quash, were all before the commencement of this action; the question of the constitutionality of the statute in question was also raised by these plaintiffs at the preliminary hearing in the criminal prosecution above mentioned; that this Court is, therefore, without jurisdiction to enjoin the prosecution of said actions.

Wherefore, defendants pray and hereby move the court that this action be dismissed, with costs against the plaintiffs herein.

CLARENCE C. CALDWELL,

Attorney General of South Dakota,

Attorney for Defendants.

52

STATE OF SOUTH DAKOTA,

County of Miner, ss:

I, Clarence C. Caldwell being first duly sworn on my oath depose and say: that I have read the above and foregoing answer and know the contents thereof and that the same is true except only as to matters stated upon information and belief and as to such matters that I verily believe it to be true; that I am the Attorney

General in and for the State of South Dakota, duly elected, qualified and acting; that I am one of the defendants in this action and that I am duly authorized to make this appearance and verification for and on behalf of each of the others of said defendants.

CLARENCE C. CALDWELL.

Subscribed and sworn to before me this 17th day of November, 1915.

[NOTARIAL SEAL.]

RICHARD E. BALDWIN,

Notary Public.

(Endorsed:.) #753 S. D.—United States of America, District of South Dakota, Southern Division—In District Court—Sioux Falls Stock Yards Co. Plaintiff, vs. Clarence C. Caldwell, et al., Defendants—Answer—Clarence C. Caldwell, Attorney for defendants, Howard, S. D.—Filed November 18, 1915, Oliver S. Pendar, Clerk, By C. C. Schwarz, Deputy.

And on the same day there was filed in the Office of the Clerk of said Court an Order transferring the case to Equity side of Court; which Order is in words and figures following, to-wit:

53 In the District Court of the United States within and for the Southern Division of the District of South Dakota.

Law Docket. No. 753.

SIOUX FALLS STOCK YARDS COMPANY et al., Plaintiffs,
vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio eMnber of the State Securities Commission, et al., Defendants.

On this 18th day of November, A. D., 1915, it having been called to the attention of the Court that a praecipe for summons in the above entitled case was filed on November 3rd, 1915, and signed by the attorneys for the plaintiff herein, directing the Clerk to issue a Summons for Relief, in the above entitled action; and it appearing upon examination of the Bill of Complaint herein, that the same is clearly a suit in equity; and it further appearing that the defendants herein, on November 18th, 1915, filed their Answer to said Bill of Complaint, hence waiving all objections to the form or manner of service, of the process herein;

It is therefore ordered, that the above entitled cause be transferred from the law docket of this Court, to the equity docket thereof, and all further proceedings in said case be had upon the equity side of this Court.

By the Court:

JAS. D. ELLIOTT, *Judge.*

Attest:

[SEAL OF COURT.]

OLIVER S. PENDAR, *Clerk.*

(Endorsed:) #753, S. D.—SIOUX FALLS STOCK YARDS Co., et al. vs. Clarence C. Caldwell, et al.—Order transferring case to Equity side of Court—Filed November 18, 1915, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

54 And on the same day there was filed in the office of the Clerk of said Court a Motion to Deny Injunction; which Motion is in words and figures following, to-wit:

UNITED STATES OF AMERICA,
Southern Division of the District of South Dakota:

In the District Court of the United States for the District of South Dakota.

SIOUX FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs,

vs.

CLARENCE C. CALDWELL, at Attorney General for the State of South Dakota, and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants.

Come now the above named defendants in response to the order to show cause herein issued on the 29th day of October, A. D. 1915, and upon all of the records and files herein, respectfully ask of this Honorable Court that the temporary injunction prayed for in plaintiff's bill of complaint be not issued and that the temporary restraining order hereinbefore issued by the court be vacated and set aside.

CLARENCE C. CALDWELL,
Attorney General of South Dakota,
Attorney for Defendants.

(Endorsed:) #26 S. D. Equity—United States of America, State of South Dakota, District of South Dakota, Southern Division, In District Court—Sioux Falls Stock Yards Co. et al., plaintiff,
55 vs. Clarence C. Caldwell, et al. Motion to Deny Injunction—Clarence C. Caldwell, Attorney for Defendants, Howard, S. D. Filed November 18, 1915, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

And on the same day there was filed in the Office of the Clerk of said Court an Interlocutory Injunction; which Injunction is in words and figures following, to-wit:

In the District Court of the United States for the District of South Dakota, Southern Division.

SIOUX FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota, and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants.

On this 18th day of November, A. D. 1915, the case above entitled came on for hearing upon the order to show cause why an interlocutory injunction herein should not issue.

56 Mr. George J. Danforth appeared and argued the matter for the plaintiffs, and Mr. C. C. Caldwell, Attorney General of the State of South Dakota, appeared and argued the questions in controversy for the defendants.

And now, after consideration of the pleadings and the arguments, because, in the opinion of the court, Chapter 275 of the Session Laws of the State of South Dakota for the year 1915, is violative of the constitution of the United States, and his opinion is confirmed by the decisions in Alabama & No. Transportation Co. v. Doyle, 210 Fed. 173, Wm. R. Compton Co. vs. Allen et al., 216 Fed. 537 and Bracey vs. Darst, 218 Fed. 482,

It is hereby ordered, that the defendants, Clarence C. Caldwell, as Attorney General of the State of South Dakota, Harry O'Brien, as Insurance Commissioner of the State of South Dakota, and Ex-officio member of the State Securities Commission of that State, Joseph L. Wingfield, as Public Examiner of the State of South Dakota, and Ex-officio member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, and each of them individually, and each and all of their agents, servants and assistants, and all others to whom knowledge of this order may come, be and they are hereby enjoined

57 from instituting and prosecuting any actions, civil or criminal, against the complainants under the aforesaid act of the Legislature of the State of South Dakota, for alleged violations thereof, and from taking any proceedings for the enforcement of said act, against the complainants, except such proceedings as may be deemed proper by them in the criminal actions already pending against the complainants.

This injunction shall take effect upon the filing of a bond, approved by the Judge of the United States District Court for the

District of South Dakota, to the United States, in the sum of Three Thousand Dollars (\$3000.00) conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby; such bond to contain a clause providing that any damages sustained thereunder are to be ascertained as the Court shall direct.

And this injunction shall continue until the final decision of this case, or the further order of the Court.

By the Court:

WALTER H. SANBORN,
United States Circuit Judge.
THOS. C. MUNGER,
United States District Judge.
JAS. D. ELLIOTT,
United States District Judge.

Attest:

[SEAL OF COURT.] OLIVER S. PENDAR, *Clerk.*

58 (Endorsed:) #26 S. D. Eq.—United States District Court, District of South Dakota, Southern Division.—Sioux Falls Stock Yards Company, a corporation, et al., Plaintiffs, vs. Clarence C. Caldwell, as Attorney General for the State of South Dakota and Ex-officio member of the State Securities Commission of the State of South Dakota, et al. Defendants.—Order—Filed November 18, 1915, Oliver S. Pendar, Clerk.

And, afterwards, to-wit: on the 13th day of December, A. D., 1915, there was filed in the Office of the Clerk of said Court, an Assignment of Errors; which Assignment of Errors is in words and figures following, to-wit:

In the District Court of the United States for the District of South Dakota, Southern Division,

In Equity. No. 26.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs and Appellees,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants and Appellants.

Assignment of Errors.

Now come the defendants and appellants in the above entitled cause and file the following assignment of errors upon which they

will rely upon their prosecution of the appeal in the above entitled cause from the order made by this Honorable Court on the 19th day of November 1915, and defendants say that the court erred therein in the following particulars, to-wit:

59

First.

In holding and deciding that chapter 275 of the session laws of the State of South Dakota for the year 1915 is unconstitutional.

Second.

In denying defendants' motion that a temporary injunction restraining these defendants from enforcing chapter 275 of the session laws of South Dakota of 1915, against these plaintiffs, be not issued and that the temporary restraining order theretofore issued be vacated and set aside.

Third.

In issuing the temporary injunction restraining and enjoining these defendants, their agents, servants and assistants and all others to whom knowledge of the order might come from bringing or causing to be brought any further actions or prosecutions against these plaintiffs for any violations of said chapter 275 of the session laws of South Dakota of 1915.

Fourth.

In deciding and holding that the plaintiffs have no adequate remedy at law.

Fifth.

In holding and deciding that this is not an action against the State of South Dakota contrary to the provisions of the eleventh amendment to the United States Constitution.

60

Wherefore the appellants pray that said order be reversed and that said District Court for the District of South Dakota be ordered to enter an order reversing its decision in the said cause.

Dated this 11th day of December, 1915.

CLARENCE C. CALDWELL,

Attorney General for the State of South Dakota,

Attorney for Defendants and Appellants.

(Endorsed:) #26 S. D. Equity—Sioux Falls Stock Yards Co. et al., vs. Clarence C. Caldwell, et al.—Assignment of Errors—Filed December 13, 1915, Oliver S. Pendar, Clerk.

And on the same day there was filed in the Office of the Clerk of said Court a Petition for and Order Allowing appeal; which Petition and Order are in words and figures following, to-wit:

In the District Court of the United States for the District of South Dakota, Southern Division.

In Equity. No. 26.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs and Appellees,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State Attorney of Turner County, South Dakota, Defendants and Appellants.

Petition for Appeal.

To the Honorable James D. Elliott, District Judge:

The above-named defendants conceiving themselves aggrieved by the order entered on the 19th day of November, 1915, in
61 the above entitled proceeding do hereby appeal from said order to the Supreme Court of the United States and they pray that their appeal may be allowed, that citation be issued as provided by law, and that transcript of the record and proceedings and papers upon which said order was made, duly authenticated be sent to the Supreme Court of the United States under the rules of such court in such cases made and provided.

Dated this 10th day of December, A. D. 1915.

CLARENCE C. CALDWELL,

*Attorney General of South Dakota, Attorney for
Defendants and Appellants, Howard, South Dakota.*

The plaintiffs and appellees having by stipulation filed herein waived the giving of bond on this appeal, the appeal is hereby allowed, no bond to be required.

By the Court:

12/13/15.

JAS. D. ELLIOTT, *Judge.*

Attest:

[SEAL OF COURT.] OLIVER PENDAR, *Clerk.*

(Endorsed:) #26 S. D. Equity—Sioux Falls Stock Yards Company, et al. vs. Clarence C. Caldwell, as Attorney General for the State of South Dakota, and Ex-officio member of the State Securities Commission of the State of South Dakota, et al. Petition for and Order allowing Appeal—Filed December 13, 1915, Oliver S. Pendar, Clerk, by C. C. Schwarz, Deputy.

62 And on the same day there was filed in the office of the Clerk of said Court a Stipulation waiving Bond on Appeal; which Stipulation is in words and figures following, to-wit:

In the District Court of the United States for the District of South Dakota, Southern Division.

In Equity. No. 26.

SIOUX FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs and Appellees,
vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants and Appellants.

Stipulation.

It is hereby stipulated and agreed by and between the above named plaintiffs and appellees and the above named defendants and appellants through their respective attorneys, that the filing of bond on appeal has been and is hereby waived.

Dated this 10 day of December, 1915.

GAMBLE, WAGNER & DANFORTH,
Attorneys for Plaintiffs and Appellees.
CLARENCE C. CALDWELL,
Attorney for Defendants and Appellants.

(Endorsed:) #26 S. D. Equity—Sioux Falls Stock Yards Company, et al. vs. Clarence C. Caldwell, as Attorney General for the State of South Dakota, and ex-officio member of State Securities Commission of State of South Dakota, et al.—Stipulation waiving Bond on Appeal—Filed December 13, 1915, Oliver S. Pendar, Clerk, By C. C. Schwarz, Deputy.

63 And, on the same day, there was filed in the office of the Clerk of said Court Præcipe for Record; which Præcipe for Record is in words and figures the following, to-wit:

In the District Court of the United States for the District of South Dakota, Southern Division.

SIoux FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs and Appellees,

v.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants and Appellants.

Præcipe for Record.

To the Clerk of the District Court of the United States for the District of South Dakota:

You will incorporate into the transcript on appeal in the above-entitled cause the following portions of the record in said cause:

1. Summons with Marshal's return of service thereof.
2. Bill of complaint.
3. Order to show cause why temporary injunction should not be issued.
4. Answer.
5. Return to order to show cause.
6. Order of injunction.
7. Petition for appeal with order allowing same.
- 64 8. Stipulation waiving bond on appeal.
9. Assignment of errors.
10. Citation on appeal.
11. Præcipe for record on appeal.

Dated at Howard, South Dakota, this 13th day of December, 1915.

CLARENCE C. CALDWELL,

Attorney General for the State of South Dakota,

Attorney for Defendants.

(Endorsed:) United States of America, District of South Dakota, Southern Division—In District Court—Sioux Falls Stock Yards Co. et al. Plaintiff vs. Clarence C. Caldwell et al. Defendants—Præcipe—Clarence C. Caldwell, Attorney for Defendants, Howard, S. D.—Filed December 13, 1915. Oliver S. Pendar, Clerk.

65 In the District Court of the United States for the District of South Dakota, Southern Division.

SIOUX FALLS STOCK YARDS COMPANY, a Corporation; WILLIAM MORLEY and HARRY MORLEY, Plaintiffs and Appellees,

vs.

CLARENCE C. CALDWELL, as Attorney General for the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Harry O'Brien, as Insurance Commissioner of the State of South Dakota and ex Officio Member of the State Securities Commission of the State of South Dakota; Joseph L. Wingfield, as Public Examiner of the State of South Dakota and ex Officio Member of the State Securities Commission, and Dan E. Hanson, as State's Attorney of Turner County, South Dakota, Defendants and Appellants.

Due and legal service of the Petition for Appeal with order allowing same, Assignment of Errors and Praeipe for Records on Appeal, is hereby admitted by receipt of copies of all of said papers, this 30th day of December, 1915.

GAMBLE, WAGNER & DANFORTH,
Attorneys for Plaintiffs.

(Endorsed:) In United States District Court, District of South Dakota, Southern Division—Sioux Falls Stock Yards Co., et al., Plaintiffs, vs. Clarence C. Caldwell, et al., Defendants—Acceptance of service of Petition for Appeal with Order allowing same, Assignment of Errors and Praeipe for Records on Appeal—Filed December 31, 1915, Oliver S. Pendar, Clerk.

66 UNITED STATES OF AMERICA,
Southern Division, District of South Dakota, ss:

I, Oliver S. Pendar, Clerk of the District Court of the United States, in and for the District of South Dakota, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of 65 pages, numbered consecutively from 1 to 65 inclusive, is a true and complete transcript of the records, process, pleadings and injunction as enumerated in the written praeipe of the parties appellant to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript and included within said paging, the original Citation, together with the admission of service thereof, and in addition thereto a copy of said Praeipe.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Court, in the said District, this 31 day of December, A. D. 1915.

[Seal U. S. Dist. Court, Dist. of South Dakota.]

OLIVER S. PENDAR, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled 12, 31, '15. O. S. P., cl'k.]

Endorsed on cover: File No. 25,143. South Dakota, D. C. U. S. Term No. 860. Clarence C. Caldwell, as attorney general for the State of South Dakota and ex officio member of the State Securities Commission of the State of South Dakota, et al., appellants, vs. The Sioux Falls Stock Yards Company, William Morley, and Harry Morley. Filed February 21st, 1916. File No. 25,143.

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(25,143)

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 860.

CLARENCE C. CALDWELL,
 as Attorney General for the State
 of South Dakota, and Ex-Officio
 Member of the State Securities
 Commission of the State of South
 Dakota, et al,

*Appellants.**vs.*

THE SIOUX FALLS STOCK YARDS
 COMPANY, WILLIAM MORLEY, and
 HARRY MORLEY,

Appellees.

BRIEF FOR APPELLANTS.

This action was brought by plaintiffs and appellants in the United States District Court for the District of South Dakota for the purpose of obtaining a permanent injunction against the appellants restraining said appellants from instituting criminal actions against appellees for violation of Chapter 275, of the Session Laws of the State of South Dakota for the year 1915 and interfering with their rights in making sales of the stock of the Sioux Falls Stock Yards Company. An application was made by appellees to the Judge of said Court for a temporary or interlocutory injunction during the pendency of said action. A hearing was had upon the application of appellees for such interlocutory injunction under the provisions of Section 266, of the Act of Congress entitled "An act to codify, revise and amend the laws relating to the Judiciary," approved March 3, 1911, as amended by Act of March 4, 1913. (37 Stat. L. 1013). The Judge of the District Court called to his assistance to hear and determine the application, two other Judges, as provided by said statute, namely, United States Circuit Court Judge Walter H. Sanborn, and United

States District Judge Thos. C. Munger, and an order was made in said cause by the said Judges, which granted the application of appellees for an interlocutory injunction, and which restrained appellants from instituting and prosecuting any actions, civil or criminal, against appellees under the aforesaid act of the Legislature of the State of South Dakota, for alleged violations thereof, and from taking any proceedings for the enforcement of said act, against the said appellees. From this interlocutory order of injunction appellants have appealed to the Supreme Court of the United States.

STATEMENT OF THE CASE.

The South Dakota Act brought into question (Chapter 275, Session Laws of 1915) is popularly known as a Blue Sky Law. It was passed at the 1915 session of the Legislature of South Dakota, was approved March 15, 1915, and went into effect on July 1st, 1915. This act creates "A "State Securities Commission" to consist of the Public Examiner, the Attorney General and Commissioner of Insurance. It defines an investment company for the purposes of the Act to be "every person, corporation, co-partnership, company or association (except those exempt under the provisions of this act) organized or thereafter organized in this state, or resident of or organized in any other state, territory, or government which shall either himself, themselves or itself, or by or through others, *engage in the business* of selling or negotiating for the sale of any stocks, bonds, investment contracts or other securities issued by him, them or it, *within the state of South Dakota.*"

There is exempted from the provisions of the Act:

(a) Securities of the United States; or any foreign government or of any State or territory thereof, or of any county, city, township, district or other public taxing subdivision of any State or territory of the United States, or any foreign government. (b) Unsecured commercial paper; (c) Securities of public or quasi public corporations, the issue of which securities are regulated by the South Dakota Railroad Commission or by a public service commission or board of equal authority of any state or territory of the United States or securities senior thereto. (d) Securities of State or National Banks or Trust Companies, or building and loan associations of this State. (e) Securities of any domestic corporation organized without capital stock and not

for pecuniary gain, or exclusively for educational, benevolent, charitable or reformatory purposes. (f) Mortgages upon real and personal property situated within this State where the entire mortgage is sold and transferred with the note or notes secured by such mortgages. (g) Increase of stock sold and issued to stockholders, also stock dividends. (h) Securities which are listed in any Standard Manual of Information approved by said Commission. (i) Isolated or single transactions.

An investment company (Secs. 4 and 6 of Act) or dealer in the stocks, bonds or securities of an investment company (Sec. 10 of Act.) before selling, offering for sale, taking subscription for, or negotiating for the sale of such securities in the State of South Dakota, must make application for a permit, and submit certain information and data prescribed by the statute to the said State Securities Commission and pay a filing fee prescribed by the statute. The said State Securities Commission shall hear such application, and if in the opinion of such Commission such contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that their sale would work a fraud upon the purchaser, the Commission is authorized to disapprove the sale of same. If, however, said Commission shall not find that the proposed plan of business, or the proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of the Commission work a fraud upon the purchaser thereof, then it is authorized to approve the sale of the same in the State of South Dakota, and issue its certificate to that effect. It is made unlawful for any investment company or dealer or representative thereof, to sell, take subscriptions for or negotiate for the sale in any manner whatever in South Dakota, any stocks, bonds, investment contracts or other securities, unless and until the said Commission has approved thereof and issued its certificates in accordance with the provisions of the state. Penalties by fine and imprisonment in the county jail are prescribed for violations of the act.

Appellees Bill of Complaint and Application shows that the complainant, the Sioux Falls Stock Yards Company, is a corporation of the state of Colorado, and that the complainants, William Morley and Harry Morley, are residents and citizens of the State of Iowa. That during the year

1915, both before and after July 1st, of that year, the Sioux Falls Stock Yards Company was engaged in the business of building and constructing a stock yards in the City of Sioux Falls, Minnehaha county, South Dakota, and was engaged at such time in selling certain of its capital stock for the purpose of raising sufficient capital to complete the construction of its said stock yards in the City of Sioux Falls. That the complainants, William Morley and Harry Morley were at such times engaged in the business of selling the stock of the Sioux Falls Stock Yards Company within the state of South Dakota. That in October, 1915, the defendant, Dan E. Hanson, as State's Attorney of the County of Turner, and State of South Dakota, at the instigation and request of the other defendants as members of the State Securities Commission, caused to be instituted against the complainants criminal proceedings for the selling of the capital stock of the complaining corporation without having complied with the provisions of said Chapter 275, Session Laws of South Dakota for the year 1915, and that the defendants intend and will continue to persecute the complainants for such violations of said statute so long as complainants sell or offer for sale any stock of the Sioux Falls Stock Yards Company within the state of South Dakota. That the complainants desire to continue the sale of the securities and stocks of the said Sioux Falls Stock Yards Company within the State of South Dakota, and that the business of said corporation cannot be promoted without the continued sale of its stock. That the acts of defendants under said chapter 275 are depriving complainants of the right to sell the capital stock of said Sioux Falls Stock Yards Company within the State of South Dakota, and deprives them of their property without due process of law in violation of Section 1 of Article 14 of the Constitution of the United States and Section 2 of Article 6, Constitution of the State of South Dakota; that there is thereby denied to the complainants the equal protection of the laws as guaranteed to them by the Fourteenth amendment to the Federal Constitution; that the law imposes a burden upon and practically prohibits interstate commerce, contrary to section 8 of Article 1, of the Constitution of the United States, and said statutes attempt to vest and delegate to the said State Securities Commissions judicial powers unauthorized by law.

The hearing for the interlocutory injunction was had upon the Bill of Complaint, which constituted the showing and

application for the complainants. Appellants moved that the application of appellees for such interlocutory injunction be denied, and the temporary restraining order of the court pending the hearing be vacated and set aside, thus in effect demurring to the application of appellees. The Court rendered no formal opinion but in the interlocutory injunction order, made a finding that Chapter 275, Session Laws of South Dakota for the year 1915, was violative of the Constitution of the United States, basing such finding in the order upon the decisions in *Alabama & No. Transportation Co. vs. Doyle*, 210 Fed. 173, *Wm. R. Compton Co. vs. Allen et al.*, 216 Federal 537, and *Bracey vs. Darst*, 218 Federal 482. Such interlocutory injunction enjoined appellants from instituting and prosecuting any actions, civil or criminal against appellees under the aforesaid act of the Legislature of the State of South Dakota, for alleged violations thereof, and from taking any proceedings for the enforcement of said act against the appellees, except such proceedings as may be deemed proper by them in the criminal actions already pending against the appellants. From such interlocutory injunction, appeal has been taken to this Court.

APPELLANTS' SPECIFICATIONS OF ERROR.

Appellants filed with their petition for appeal an assignment of errors, and same has been printed as part of the transcript of the record. (p. 34, 35). Appellants now specify as errors relied upon in this court the matters so assigned in this record, to-wit:

Appellants say that the Honorable District Court of the District of South Dakota erred in making the said interlocutory injunction order dated November 18th, 1915, (Tr. of Record, p. 33), in the following particulars, namely:

First.

In holding and deciding therein that Chapter 275 of the Session Laws of the State of South Dakota for the year 1915 is unconstitutional. (Assignment No. 1, Tr. of Record, p. 35).

Second.

In denying appellant's motion that a temporary injunction restraining these appellants from enforcing chapter 275 of the Session Laws of South Dakota of 1915, against these appellees, be not issued, and, that the temporary restraining order theretofore issued be vacated and set aside. (Assignment No. 2, Tr. of Record, p. 35).

Third.

In issuing the temporary injunction restraining and enjoining these appellants, their agents, servants and assistants and all others to whom knowledge of the order might come from bringing or causing to be brought any further actions or prosecutions against appellants for any violations of said chapter 275 of the Session Laws of South Dakota of 1915. (Assignment No. 3, Tr. of Record p. 35).

ARGUMENT.

This case involves the validity of the 1915 South Dakota "Blue Sky Law." The avowed object of the statute is to prevent fraud being practiced upon the people of the State in the sale of stocks, bonds and other securities. Some twenty-six of the states of the Union a list of which is given in the appendix now have a blue sky law of some form. After the decisions in the cases of *Alabama Co. vs. Doyle*, 210 Fed. 173, and *Compton vs. Allen*, 216 Fed. 537, holding the blue sky statutes of Michigan and Iowa invalid respectively the National Association of Attorneys General at their annual meeting in October 1914, appointed a committee to draft and submit a new proposed blue sky law. This committee reported December 28th, 1914, with a draft of a new proposed law. In the meantime, after the appointment of the committee, but before its report, the decision in *Bracey vs. Darst*, 218 Fed. 482, holding invalid the West Virginia blue sky law, had been made, so the committee drafted the new proposed measure in the light of the attacks upon the constitutionality of the old statutes and having before them the views of the various courts that had been called upon to pass upon the validity of such statutes. The committee was composed of attorneys general who had had a part in this litigation. In its report of the new proposed law, the committee stated: "The committee has therefore framed a bill with the sole object of preventing fraud in the sale of stocks, bonds and other securities, by requiring inspection, and a sufficient amount of supervision to accomplish this end."

The South Dakota law involved in this appeal was patterned after the proposed measure recommended by the committee of Attorneys General, with such slight changes as were needed to fit in with South Dakota institutions. A comparison of this with the earlier statutes involved in the Michigan, Iowa and West Virginia cases, *supra*, will show

radical changes in its form and provisions. These changes were recommended by the committee of Attorneys General and were incorporated in the South Dakota law with the design of removing the objections that the Federal Courts had found to the earlier blue sky statutes. Nevertheless the lower court in this action, without formal opinion, without discussing the changes that had been incorporated in the South Dakota statute to meet the objections of the courts to the earlier statutes, but basing its order upon the decisions upon the earlier statutes has held herein the South Dakota statute "violative of the Constitution of the United States."

Likewise Michigan in 1915, revised its blue sky law in accordance with the recommendation of the committee of Attorneys General. This law came before the Federal District Court for review in *Halsey vs. Merrick*, 228 Fed. 805. The court in its opinion reviews some of the changes made by the 1915 law, but concludes no real change from the 1913 law had been accomplished, and that the law still impresses upon interstate commerce a burden which is direct and beyond the limits of the police power of the state.

A review of the decisions of the Federal District Courts upon the various "blue sky laws" would seem to indicate that the principal constitutional objection to such laws is that it violates the commerce clause of the Federal constitution. The latest decision relating to the Michigan law (*Halsey vs. Merrick*, *supra*) finds the law invalid on that ground alone. It would seem that other constitutional objections urged against the earlier laws had been eliminated by their revision. However respondents have raised other questions in the case relating to the revised South Dakota law, and the Court does not specify the ground of its decision. We shall consider these objections first, and together.

Due Process of Law, Equal Protection of the Laws, Delegation of Judicial Power.

Appellees urged in their bill of complaint that the statute in question denied them the equal protection of the laws; that it deprived them of their property without due process of law, and that the statute unlawfully attempts to confer judicial power upon an administrative board.

All persons and classes of persons, residents and non-residents, natural persons, associations, and corporations are treated alike by the statute. We see no basis for any claim

on the part of respondents that they are denied by the statute the equal protection of the laws.

As to the contention regarding "due process of law" we find at section 1 of the act that regular monthly meetings of the Commission are required, and it is provided that special meetings may be called at any time by the president. At section 7 of the act it is provided that if an application is considered by the Commission at a special or adjourned meeting thereof, two days notice of the hearing shall be given to the applicant. It is provided at section 22 of the act that the Supreme Court of the state may by certiorari review the proceedings of the Commission. In view of these provisions the appellants contend that even if it should be held that the refusal of the Commission to issue a license to sell stock to these plaintiffs would be depriving them of their property, that it would not follow that the plaintiffs were being deprived of such property "without due process of law." The plaintiffs have had a hearing, or could have had a hearing had they desired, before a board constituted for that purpose. If the Board had exceeded or should exceed its jurisdiction the error could be corrected by the supreme court.

The words "due process of law" do not necessarily imply judicial action. Private rights and the enjoyment of property may be interfered with by the legislative and executive as well as the judicial department of government.

Reetz vs. Michigan, 188 U. S. 505.

Davidson vs. City of Orleans, 96 U. S. 97, 24 L. Ed. 616.

Palmer vs. McMahon, 133 U. S. 660, 33 L. Ed. 772, 10 Sup. Ct. 324.

Baltimore Belt R. Co. v. Baltzell, 75 Md. 94, 23 Atl. 74.

In re Ross 38 La. Ann. 523.

Eames vs. Savage, 77 Me. 212, 52. Am. Rep. 751.

State vs. State Board of Med. Examiners, 34 Minn. 387, 26 N. W. 123.

Weimer vs. Bunbury, 30 Mich. 201.

Gilchrist vs. Schmedding, 12 Kan. 263.

Ry. Comrs. vs. Ry. Co., 82 S. C. 418.

Wadley So. Ry. Co. vs. State, 137 Ga. 497.

St. Louis etc. Ry. Co. vs. State, 136 S. W. 438.

Spurr vs. Travis, 145 Mich. 721.

Union Central Life Ins. Co., vs. Chowning, 86 Tex.

654, 26 S. W. 982, 24 L. R. A. 504.

Id 8 Tex App. 455, 28 S. W. 117.

Anderson vs. Ritterbush, 22 Okl. 761, 98 Pac. 1002.

Meffert vs. State Bd. of Med. etc., 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811.

In *Reetz vs. Michigan*, 188 U. S. 505, which was a prosecution for practicing medicine without obtaining a license from the state board as required by the state law, the United States Supreme Court said: "It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant has been 'legally registered under act No. 167 of '1883.'" That, it is contended is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the state supreme court is conclusive that the act does not conflict with the state Constitution, and we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process.

Here the statute provides for notice and an opportunity to be heard, and even provides for a review by a regular judicial tribunal. All of the essentials of a regular proceeding have been provided for the determination of an administrative question.

Ballard vs. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461.

It may be conceded that the legislature could not make a court of the Securities Commission and confer upon them strictly judicial functions. But the statute does not do this. It makes it an administrative board vested with discretionary powers, sometimes denominated quasi-judicial, to determine the questions necessarily incident to its administrative duties. As was stated in the opinion in *Conover vs. Galton*, 251 Ill. 587, 96 N. E. 522, "Executive officers are 'frequently under the necessity of determining facts from 'evidence or their own knowledge and of deciding and acting in accordance with such finding. The acts of clerks,

"sheriff and constables in taking and approving bonds of
 "assessors and boards of review in valuing property for
 "taxation, of city councils in granting or revoking licenses
 "to keep dramshops or to conduct business of various kinds,
 "of superintendent of schools in granting and revoking
 "teachers' certificates of the State Board of Health in ascer-
 "taining and determining qualifications of physicians to
 "practice medicine and in granting and revoking permits
 "for that purpose, of boards of supervisors in removing
 "county officers, are all based upon the judgment of the re-
 "spective officers, require the exercise of discretion and are
 "in their nature judicial. The power exercised is not how-
 "ever, that belonging to the judicial department of the gov-
 "ernment but is incidental only to the executive or adminis-
 "trative powers conferred by law upon such officers."

Other authorities along the same line are:

Reetz vs. Michigan, *supra*.

Tyson vs. Washington County, 110 N. W. 634.

Klafter vs. State Board, 259 Ill. 15, 46 L. R. A. (N. S.) 532.

Mo. etc. Ry. Co. vs. Shannon, 100 S. W. 138, 10 L. R. A. (N. S.) 68.

Territory of Dakota vs. Cox, 6 Dak. 501.

Graften vs. St. Paul etc. Ry. Co. 16 N. D. 313, 113 N. W. 598, 22 L. R. A. (N. S.) 1.

The Commerce Clause.

As we have seen, the principal objection found by the courts, and the one, which we anticipate will be most strongly relied upon here, is that the statute in question constitutes an unwarranted burden upon interstate commerce. Appellants position upon this question may be summed up in two propositions, namely, first, that no interstate commerce transaction is involved in this cause; and second, that assuming an interstate commerce transaction is involved, the statute is valid as an inspection law.

FIRST PROPOSITION.

It is the contention of appellants that no interstate commerce transaction is involved. The opinions by the several Federal District Courts that have passed upon Blue Sky Laws have discussed at length the question whether stocks, bonds and securities are "subjects of interstate commerce." In Alabama, etc. Company vs. Doyle, 210 Fed. 173, the Court concludes upon the authority of the Louisiana Lottery cases (188 U. S. 321, 23 Sup. Crt. 321, 47 L. Ed. 492) that

bonds and commercial paper, and probably stocks are the subject of interstate commerce. The later cases in 216 Fed., 218 Fed. and 228 Fed. follow the Doyle case.

The lottery cases in 188 U. S. referred to above involved an act of Congress which made it a criminal offense to transport by mail or other common carrier from one state to another any lottery ticket. The question before the Court was whether the power given Congress to regulate interstate commerce sustained this statute. The Court, four justices dissenting, held that the act of Congress was valid under the commerce clause of the Constitution. The Court in the majority opinion stated as to the scope of that decision as follows:

"We decide nothing more in the present case than that 'lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce.'"

The Court further says in the opinion with respect to the scope of its decision as follows:

"It (the act of Congress) has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'wide spread pestilence of lotteries' and to protect commerce which concerns all of the state may prohibit the carrying of lottery tickets from one state to another."

In the minority opinion by Chief Justice Fuller, it was contended vigorously that since lottery tickets were mere evidences of contractual relations, and had in themselves no value, they should not be considered subjects of interstate commerce, upon which Congress should legislate at all.

In *Nathan vs. Louisiana* the power of the state of Louisiana to impose an occupation tax on a money and exchange broker dealing in foreign bill of exchange, was upheld. The business of the broker was limited to foreign bills of exchange. He issued the bill of exchange, took his customer's money for it and delivered the bill to the customer to be transmitted to the drawee in a foreign state. The bill of exchange was thus transmitted from one state to another

and the court conceded that the bill might thus be an instrument of interstate commerce. But the court said:

"A bill of exchange is neither an export nor an import, it "is not transmitted through the ordinary channels of commerce but through the mail. The individual who uses his "money and credits in buying and selling bills of exchange, "and who thereby realizes a profit, may be taxed by a state in "proportion to his income as other persons are taxed, or in "the form of a license. He is not engaged in commerce but "in supplying an instrument of commerce. He is less connected with it than the ship builder without whose labor "commerce could not be carried on."

The issuing of a policy of insurance is another example. It is safe to say that the greater part of the insurance business of the country is done by companies outside the state of their domicile or residence. Necessarily in such cases the insurance contracts must be transported from the state where the company is located to the state where the contract is sold. The United States Supreme Court has repeatedly refused to hold that this makes the business of insurance interstate commerce.

Paul vs. Virginia, 8 Wall. 168, 19 L. Ed. 357.

Hooper vs. California, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

New York L. Ins. Co. vs. Cravens, 178 U. S. 389, 44 L. Ed. 1, 116, 20 Sup. Ct. Rep. 962.

New York L. Ins. Co. vs. Deer Lodge Co., 231 U. S. 495, 34 Sup. Ct. Rep. 167, 58 L. Ed. 332.

In Paul vs. Virginia, *supra*, the court speaking through Mr. Justice Field said:

"Issuing a policy of insurance is not a transaction of "commerce. The policies are simply contracts of indemnity "against loss by fire, entered into between the corporation "and the assured, for a consideration paid by the latter. "These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade "and barter, offered in the market as something having an "existence and value independently of the parties to them. "They are not commodities to be shipped or forwarded from "one state to another, and then put up for sale. They are "like other personal contracts between parties which are "completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, "though the parties may be domiciled in different states.

"The policies do not take effect—are not executed contracts"—until delivered by the agent in Virginia. They are, then, "local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia would constitute a portion of such commerce."

In the recent case of *New York Life Insurance Company vs. Deer Lodge County*, supra, the question was again before this court. The court said that it regarded the matter as settled by the long line of decisions starting with the case of *Paul vs. Virginia*, supra, but reviewed the matter again at length. The view is adhered to that a policy of insurance is a personal contract, and the issuing of a policy of insurance is not a transaction of commerce.

The United States Supreme Court has further said that the business of a manufacturing company carried on within a state, although the manufactured product is sold by the company in other states and in foreign countries, is not interstate commerce.

Kidd vs. Pierson, 128 U. S. 1, 32 L. Ed 246.

U. S. vs. Knight Co., 156 U. S. 1, 39 L. Ed. 325.

The Court in *Kidd vs. Pierson*, supra, said: "If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in fact every branch of human industry. For is there one of them that does not contemplate more or less clearly an interstate or foreign market?"

From the two lines of decisions, that of *Nathan vs. Louisiana*, supra, and the cases relating to the business of insurance on the one hand, and the Lottery Cases on the other, we think it must be conceded that stocks and bonds and other securities governed by our Blue Sky Laws may be subjects of commerce. Likewise the transportation company which accepts insurance policies for transportation and sends them from place to place is surely engaged in commerce, and the insurance policy as so handled is the subject of commerce. Whether in a given case bills of exchange,

lottery tickets, stocks, bonds or other securities are or are not involved in interstate commerce, whether indeed they are subjects of commerce or not, will depend entirely upon the nature of the business that is done with these articles. Clearly we think if one is engaged in the business of transporting "by independent carriers from one state to another" as was said by the court in the Lottery Cases, stocks, bonds, or other securities, the securities are the subjects of commerce, the business of transporting them is interstate commerce, and the Congress of the United States would have the power to regulate such commerce. But from this it would not follow that the state under its police power would be denied all authority to interfere in any manner with the sale of such securities, for as above stated it was recognized in the Lottery Cases that the state could forbid the sale of the lottery tickets all together.

But are the stocks and bonds of a corporation created for example under the laws of Illinois the subjects of interstate commerce when these stocks and bonds are offered for sale, say in South Dakota, as the transaction is handled by the investment company? If the corporation in question though an Illinois corporation complies with the laws of South Dakota governing foreign corporations and becomes domiciled in South Dakota, its securities may be issued in South Dakota and therefore not transported from one state to another at all, and under such circumstances the securities could not be the subjects of interstate commerce. But would these securities be subjects of interstate commerce if issued in Illinois and sent to South Dakota. Would the person who thus offered such securities for sale be engaged in commerce or merely "supplying an instrument of commerce" as was said in *Nathan vs. Louisiana*? It will be admitted that securities will ordinarily be transmitted through the mails and not by independent carriers. The company to which our Blue Sky Laws apply is not engaged in transporting from state to state the securities which the company issues. The effect of the Lottery Case decision merely is that Congress would have the power to regulate the transportation of securities from one state to another. The transportation company would doubtless be engaged in interstate commerce, but the business of the company issuing the securities is very different. This company's business so far as we are concerned with it is the securing or borrowing of money upon the stocks and bonds issued. Our Blue Sky Laws aid direct-

ly at the sales of these stocks and bonds, and if they affect interstate commerce at all it is only incidental and indirect. A bond is a mere "promise to pay" and it is not different from a bill of exchange. A certificate of stock is a mere contract entitling the stock holder to certain rights, and is not different from an insurance policy. It is our belief that the company which issues a certificate of stock or a bond, like the exchange broker who issues a bill of exchange, is not engaged in commerce, but is merely "supplying an instrument of commerce." We think therefore, that it must be conceded that securities may be subjects of commerce, but we do believe that the person or company which issues these securities is engaged in commerce within the meaning of the constitution and the decisions of the supreme court.

In the recent case of *State vs. Agey*, by the North Carolina Supreme Court, 88 S. E. 726, involving the North Carolina Blue Sky Law, the question whether the sale in North Carolina of an obligation of a corporation of Tennessee, which obligation related to certain rights in real estate in Georgia, was a transaction of interstate commerce, was involved, and the Court held that there was no element of interstate commerce involved, upon the authority of *Paul vs. Virginia*, *supra*.

Other cases may be cited in which were involved contracts "incident to commerce, but not of themselves commerce."

Williams vs. Fears, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186.

New York Ex Rel Hatch vs. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415.

Ware & Leland vs. Mobile Co., 209 U. S. 405, 28 Sup. Ct. 526, 52 L. E. 855.

Engel vs. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128.

Rast. vs. Van Deman & Lewis Co., 37 Sup. Ct. 370.

The first four of the above cases are discussed in the opinion of the *New York Life Insurance vs. Deer Lodge County* case, *supra*. The case last cited was decided March 6th, 1916, and is one of the "Trading Stamp Cases." In the last case the court considered a situation "where a manufacturer "or shipper in a state other than Florida insert in the packages of his goods which he ships to Florida such coupons or "certificates which are taken from the packages by the ultimate purchaser or consumer in Florida and sent to some "company or agency in some state of the United States out-

"side of the State of Florida, other than the manufacturer or shipper of the goods, to be redeemed or paid, and the premium or proceeds thereof is returned by such company or agency to the person in Florida who has sent such coupon or certificate." A statute of Florida required a license from one offering trading stamps with sales of merchandise. This statute was attacked as being contrary to the commerce clause of the constitution. The court held that the statute operated upon local transactions, namely, sales to the consumers in Florida; and did not affect interstate commerce, although the stamps were shipped in originally from another state with the merchandise sold, and the premium was forwarded to the consumer from another state upon his surrender of the stamp.

In these various cases involving situations which are close to the line divididing interstate commerce transactions from intrastate, the effort of the court seems to have been to determine in each case whether the transaction was essentially local, or involved as an essential element commercial intercourse between states. In other words the test is found in the character of the transaction not in the subject matter involved. The South Dakota statute under consideration applies only to sales of stocks and securities within the state (*id* sec. 10). The sale itself is a local transaction. Moreover the effect of the sale is essentially local. It invests the purchaser with certain contractual rights and privileges connected with the issuer. The delivery of the evidences of such rights and privileges is a mere incident of the transaction, which takes place and is wholly completed within the state. The person selling such stocks and securities is not engaged in interstate commerce just as the emigrant agent considered in *Williams vs. Fears*, *supra*, was not so engaged; just as the solicitors for the sale of an insurance policy in a non-resident insurance company is not so engaged.

But assuming that the sale of stocks may in some transactions and under some circumstances become an interstate commerce transaction, it is the further contention of appellants, that no interstate commerce transactions is shown or involved in this action.

Appellees in their bill of complaint in the case, it is true, recite that the Sioux Falls Stock Yards Company is a Colorado corporation having its principal place of business in Denver in that state (*Tr.* p 2) but they further recite (*id* sec. 4) that said Company was engaged in the business of

constructing a stockyard in Sioux Falls, South Dakota, and engaged in selling its stock in South Dakota to complete the construction of such yards; and further (*id.* sec. 9) that said company had complied with the laws of said state in regard to foreign corporations and had been authorized to do business therein as a foreign corporation. There is nothing in the record to imply that a sale of the stock of the respondent company involved any transportation from another state of the certificates of stock except the bare allegation that the Company is a Colorado corporation. On the other hand there is the positive showing in the bill of complaint that said corporation was domiciled in this state and doing business herein. A sale even between parties of different states is not the test of interstate commerce. "All sales of sound "articles of commerce, which necessitates the transportation "of the goods sold from one state to another are interstate "commerce."

Butler Bros. Shoe Co. vs. United States Rubber Co.,
156 Fed. 1, 84 C. C. A. 167.

But all sales between parties of different states are not interstate commerce.

Kent etc., vs. Tuttle, 20 Mont. 203, 50 Pac. 509.

Appellees have failed to show that the sales being made by them involved this vital element, viz: transportation from one state to another, which is necessary to fix its character as an interstate commerce transaction.

It may be that the stock certificates were issued within the State of South Dakota; or, it may be they were sold from the place of business of the respondent corporation within the state, or it may be that they were being offered for sale at retail, peddled within the state. In none of these cases would a sale thereof involve interstate commerce.

Ewert vs. Missouri, 156 U. S. 296, 39 L. Ed. 430, 15 Sup. Ct. Rep. 367.

American Harrow Co. vs. Shaffer, 68 Fed. 750.

Brown vs. Houston, 114 U. S. 622, 5 Sup. Ct. 1091.

Pittsburg & So. Coal Co. vs. Bates, 156 U. S. 577.

Chicago etc. Ry. Co. vs. Iowa, 233 U. S. 334, 29 Sup. Ct. Rep. 592.

Appellees must affirmatively bring themselves within the class as to which the law is invalid. The rule is thus stated in *New York Ex Rel Hatch vs. Reardon*, *supra*, as follows:

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating

"the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. *Albany County vs. Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044, 1049; *Clark vs. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392, 396, 20 Sup. Ct. Rep. 284; *Lampasas vs. Bell*, 180 U. S. 276, 283, 284, 45 L. Ed. 527, 530, 531, 21 Sup. Ct. Rep. 368; *Cronin vs. Adams*, 192 U. S. 108, 114, 48 L. Ed. 365, 368, 24 Sup. Ct. Rep. 219."

SECOND PROPOSITION.

Assuming that an interstate transaction in stocks is shown, appellants contend as a complete answer to the claim that the commerce clause of the United State Constitution is violated, that the South Dakota law is an inspection statute designed to safeguard the inhabitants of the state against fraud and imposition which is reasonable in its requirements, does not conflict with Federal regulations, is valid although it may affect interstate commerce indirectly or incidentally.

To sustain this proposition, appellants rely upon the following authorities:

Gibbons vs. Ogden, 9 Wheat. 203, 6 L. Ed. 71.

Turner vs. Maryland, 107 U. S. 38; 27 L. Ed. 370; 2 Sup. Ct. Rep. 44.

Plumley vs. Massachusetts, 155 U. S. 461; 39 L. Ed. 223, 15 Sup. Ct. Rep. 154.

Patapsco Guano Co. vs. Board of Agriculture, 171 U. S. 345, 357, 358; 43 L. Ed. 191, 195, 196; 18 Sup. Ct. Rep. 862.

Lemieux vs. Young, 211 U. S. 469.

Kidd et al vs. Musselman Co., 217 U. S. 458.

Savage vs. Jones, 225 U. S. 501; 56 L. Ed. 1182; 32 Sup. Ct. Rep. 715.

Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 744.

The right of the state to enact reasonable inspection laws is expressly secured by clause 2 of section 10, of Article I

of the United States Constitution. This right exists notwithstanding the power to regulate commerce among the states is placed in Congress by the same instrument, and notwithstanding such inspection laws of the state may incidentally affect interstate commerce.

The above cited decisions recognize and re-affirm this right of the state. In *Plumley vs. Mass.* 155 U. S. 461, it was decided that a statute, "To prevent deception in the manner and sale of imitation butter as applied to oleomargarine artificially colored so as to look like yellow butter," was not in conflict with the commerce clause of the United States Constitution. The court uses this language, "this statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such a manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale. Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may become the subject of trade in different parts of the country? * * * Such legislation may, indeed indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the (Several states.)" That decision is based upon the fact that the state was to prevent a fraud upon the general public. The court held that the state had the power to protect its citizens from being cheated in making their purchases and that thereby the commerce clause was not interfered with.

In *Patapsco Guano Company vs. North Carolina*, 171 U. S. 345, it was held that commercial fertilizer was subject to state inspection law under the police power of the state, and a statute imposing such inspection was sustained. The court says: "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. * * * It is not perceived why the prevention

"of deception in the adulteration of fertilizers does not fall
"within its scope."

In *Savage vs. Jones*, 225 U. S. 503, a statute of Indiana providing for an inspection of stock food was sustained. The statute authorized the state chemist to refuse registration of any stock food under a name which would be misleading as to the material of which it was made, and made it a criminal offense for any person to sell stock food in the State of Indiana without such registration. The Court says: "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable. * * * It is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

In the *Minnesota Rate cases*, 230 U. S. 352, decided in 1913, Justice Hughes sums up the principle sustained by such line of authorities in the words: "State inspection vs. "designed to safeguard the inhabitants of a state from "and imposition are valid when reasonable in their "ments, and not in conflict with Federal rules. "may affect interstate commerce in their relation to articles "prepared for export, or by including incidentally those "brought into the state and held for sale in the original imported package."

The principle is well settled. The difficulty is in determining whether the statute comes within the limits of the inspection power of the state as defined. It is evident that the mode of inspection must depend somewhat upon the character of the commodity inspected. Thus oil, flour, beer, and other common articles of merchandise would ordinarily be inspected by a personal visit of the inspector to the shipment and the examination of same or through samples taken. The Indiana statute relating to stock foods involved in *Savage vs. Jones*, supra, required dealers in commercial stock foods to file certain data relating to same with the State chemist before making sales, and was required to affix to every package sold a label furnished by the state chemist giving the purchaser like information. A similar scheme was employed to inspect commercial fertilizers by the North Carolina statute under consideration in *Patapsco Guano Company vs. Board of Agriculture*, supra.

In every case there is required some affirmative act on the part of both the dealer and the state before sales can be made. How shall an inspection of stocks, bonds and securities be made? As pieces of paper they have no value; they are purely representative in character. Manifestly a scheme of labeling to furnish information to the investing public would be impracticable. The scheme has been devised in the statute requiring such stocks, bonds and securities to be in effect registered with an administrative board, the State Securities Commission, who inspect same by reviewing the data furnished which determines whether they are in fact bonafide securities or fraudulent. The fraudulent securities are condemned, the bona fide securities are approved for sale to the public.

The scheme is not different in principle from an inspection of oil or other commodity. In that case the inspector takes a sample of the product, analyses it, and if it is found a bona fide product approves its sale. If it is deficient and fraudulent he rejects same and its sale is forbidden.

That the South Dakota act simply provides a scheme for the inspection of securities is fully warranted by the terms of the act.

Certain data is required to be filed with the Securities Commission by an investment company before selling its securities (Sec. 4 of Act). What is required may be summarized as follows: (a) A statement of the plan of business. (b) Copy of securities to be sold. (c) Copy of prospectus and advertising matter. (d) Location of offices. (e) Names of officers. (f) Statement of assets and liabilities. (g) Other information prescribed by Commission. (h) If a corporation, a copy of incorporation papers, by-laws, etc.

By section 9 of the Act, the Commission is required to examine the statements and documents filed and to disapprove the sale of the securities if it finds them fraudulent or that the sale would work a fraud upon the purchaser. Otherwise to approve their sale and issue permit therefor.

The foregoing briefly stated is the whole plan in the statute for the inspection of stocks and securities. It does not differ materially from the plan of inspection adopted by the states for many articles of trade, and such plan has been accepted for articles of interstate commerce as a proper exercise of the right of inspection by the state.

There is no valid objection to the general plan or scheme of the statute for inspecting stocks and securities, and cer-

tainly such general plan or scheme ought to receive the approval of this court in this action.

It may be conceded that no objections exist to the general plan in the statute for the inspection of stocks and securities, and still be contended that the details of administration included in the provisions of the statute constitute a direct burden upon interstate commerce beyond the limits of the police power of the state. In *Halsey vs. Merrick*, supra, the federal district Court found that an invalid burden was imposed, first, by reason of the delay in making inspections by "the Commission, stating that "approval would not, normally, be obtained for several days, and that it might be indefinitely withheld, without objection made or reason given, "but at the mere convenience of the commission;" and second, because the test for the approval or disapproval of the sale of stocks and securities was not limited to the question of whether they were fraudulent or not. The court suggests further that the fees required, and expense of furnishing information and for examinations under the provisions of the law, amount to a practical prohibition of all small dealings and emphasize restrictions and burden placed by the law upon interstate commerce. Examination of the South Dakota law shows that it embraces the following details of administration.

(a) Applicant must furnish data and information. (Secs. 4, 5 and 6 of law.)

(b) Company must submit to an examination at expense of applicant, if required by commission (Secs. 8 and 13).

(d) Approval of Commission must be secured; test prescribed (Sec. 9).

Inspection of stocks and securities can only be made by a review of specific information as to the character and condition of the investment company issuing same. That information must be obtained by the Commission, in one of two ways: either this must be furnished to the commission or the commission must make an examination and secure the information for itself. Both ways seem to have been provided for in the law, but they are entirely independent provisions one of which might be eliminated without affecting the other or the remainder of the law.

That inspections should be made by the examination of information furnished the Commission seems to be the natural way. To be effective the Commission must be em-

powered to require full and accurate information. The provisions of section 4 of the law relating to data to be furnished go no further in their requirements than is necessary to provide for an effective inspection. These provisions should be upheld. The right of the commission to make an examination of the affairs of an investment company as provided by section 8 of the act as a condition for the approval of the sale of its stocks and securities, or to make such examination after the approval of such sale, both at the expense of the applicant, may raise a more serious question. It is true that the expense of such an examination is uncertain and would depend much upon the officer directing or making the examination. Such examination is only made in the discretion of the Securities Commission and would be required only in special cases. The purpose of the provision seems to be to afford an effective means for the Commission to determine the character of stocks or securities offered. The respondents in this action do not claim that the Securities Commission were attempting to impose any hardship upon them in the way of making an examination under the statute, or that the Securities Commission were threatening to require that an examination be made as a condition for granting them a permit. They are objecting to any inspection, and have asked the Court to enjoin the enforcement of all provisions of the Blue Sky Law.

Are the fees excessive? The amount prescribed is one-tenth of one per cent of the gross assets of the Investment Company, not exceeding \$100 or less than \$10.00. Thus a company with assets of \$10,000 would pay a fee of \$10.00, and one with \$50,000 would pay a fee of \$50.00 for inspection of its stocks and securities proposed to be sold. This does not seem like either exorbitant or prohibitive. There is no showing that the fees prescribed realize more than the cost of inspection.

Is the requirement that the approval of the Commission be secured prohibitive? It is true the Commission holds only regular meetings monthly, but it holds special meetings on call of the president as its business requires. The Commission has a secretary who acts for the Commission, and when so acting has equal power and authority. (Sec. 1 of act.) There is no complaint made here by respondents of any hardship imposed upon them or others, or likely to be imposed by reason of having to wait for the approval of the

sale of the stocks in question. The respondents are objecting to any inspection by the state.

Is the test for approval improper and invalid? The language of the act is the same as the Michigan statute construed in *Halsey vs. Merrick*, *supra*, and provides for disapproval, if the Commission finds:

"That the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would, in the opinion of said Commission, work a fraud upon the purchaser."

The Court in its opinion in the above case seems to recognize that the finding that the securities were fraudulent justified disapproval, but concluded that the latter part of the provision where the Commission were authorized to disapprove the sale of securities if in its opinion such sale would "work a fraud upon the purchaser" must be understood to mean simply "result in loss to the purchaser," and that to attempt to so regulate the sale of securities is beyond the power of the state. It is the view of appellants here that the Court in the Michigan case was unwarranted in its construction of the statute, even in connection with the other provisions of the Michigan statute. Fraud is based upon deception and misrepresentation. To work a fraud upon a person is to obtain an advantage by deception and misrepresentation. Securities, not in themselves fraudulent, might be sold in such a way by misrepresentation as to actually work a fraud upon the purchaser. Therefore the two expressions were used in the statute, the former referring to the character of the securities as being fraudulent, and the latter referring to the manner of their disposal as working a fraud upon the purchaser. It would appear that the test was in line with the recognized purpose of the statute to prevent fraud and deception in the sale of securities, and is the proper test to be used.

The Supreme Court of North Carolina has recently sustained the Blue Sky law of that state in the case of *State vs. Agey*, 88 N. E. 726, decided May 3rd, 1916. The court was not bothered with nice distinctions as to the test to be used. It recognized that the design of the North Carolina statute was to protect the people of the state from fraud and imposition, and held that to do this was an essential

duty as well as power of government. The court in its opinion says:

"The intent of the statute is to protect our people, under the police power from fraud and imposition by irresponsible nonresident parties. These instances have been so frequent that the United States Post Office Department has estimated that the people of this country have been losing annually more than \$100,000,000 by speculative schemes which have no more substantial basis than so many feet of 'blue sky.'"

"To prevent such impositions on its people is an essential duty of government. If there is fraud and imposition in a case of this kind the parties imposed on can rarely go to Georgia and hunt up the guilty party, even if to be found there, and undergo the expense incident thereto. Even if this could be done, there would rarely be any assets which could be applied to the demands of the plaintiff. This state has sought to protect its people, not by forbidding such transactions, but by the very reasonable requirement that when parties, whether incorporated or not, acting under the authority, actual or merely asserted, of another state, propose to do business in our borders, they must submit their statement of assets, and the nature of their business to the insurance commissioner of this state who will issue his license to do business here when he is satisfied that the company or corporation is safe and solvent and has complied with the laws of this state applicable to fidelity companies and governing their admission and supervision by the insurance department and making it indictable to transact such business in this state until such license has been obtained. This is a reasonable requirement under the police power of this state."

The question is raised by the opinion in *Alabama, etc. vs. Doyle*, supra, as to whether stock and securities is a proper subject of inspection. It is argued that the dealing in stocks and securities is predominately private, that such transactions do not involve any public interest, or any public grant of sufferance, and the business of buying and selling stocks is no more affected with a public interest than the business of buying and selling groceries. We are constrained to agree with Judge Woods in his dissenting opinion in *Bracey vs. Darst*, supra, wherein he states that "What business is affected with a public interest, and therefore the proper subject of police regulation, is primarily a mat-

"ter for legislative determination (citing) *Giozza vs. Tierman*, 148 U. S. 657, *Rippey vs. Texas*, 193 U. S. 504."

As stated twenty-six of the different states of the Union have assumed to pass inspection laws affecting the sale of securities requiring that a license be issued after an examination before securities can be sold, and penalizing all sales of securities made without such inspection and license. The supreme court of the United States in *Red C. Oil Manufacturing Company vs. Board of Agriculture*, 222 U. S. 380, 56 L. Ed. 241, in answer to the contention that oil is not a proper subject of inspection said, "The conceded fact that 'in thirty-five states of the Union oil inspection laws are in 'force is sufficient to adversely dispose of the contention 'named.'" If the fact that thirty-five states have passed oil inspection laws proves that oil is a proper subject for inspection, we believe that the fact that twenty-six states have passed securities inspection laws, should be sufficient evidence that securities need inspection. Opportunity for fraud in business has generally been recognized as a ground for the regulation of such business to prevent such fraud. It has sustained the regulation of even the business of selling groceries. He must be indeed unread and uninformed that has not been impressed with the great development in these later years of the business of selling stocks and securities. It is a part of the commercial growth of the country. Capital has been brought together in great complex organizations, and must need be so brought together in order to carry on industrial operations under present day conditions. Rapid transit and means of communication has facilitated the dealing in stocks and securities of such organizations of capital. Thus out of the commercial growth has sprung up a new business and vocation, stock selling and promoting. The means for fraud and imposition are peculiarly present. Rights or shares in great, complicated business organizations are being sold. The ordinary investor has little skill or means for investigating such organizations. He is not on equal footing with the unscrupulous promoter who paints in glowing colors the contemplated success of his proposed enterprise. He ought not to be allowed to prey upon the public undisturbed. There ought to be some way for an efficient government agency to inspect these articles of trade and fix upon and deny to the channels of commerce those that are fraudulent. The law ought to be progressive. Inspection of securities ought not to be condemned because

there are no precedents for such inspection. The principle that the state has power to protect its citizens against fraud ought to be extended to meet all new conditions, else law and government is indeed impotent.

Statute Declared Severable.

By section 24 of the South Dakota Act in question the legislature has declared that the various sections and provisions of the act shall be severable, so that if any one section or provision is declared unconstitutional or invalid, the remaining portion of the act shall not be affected. This is perhaps a legislative declaration of what would be already the rule of law. It is a legislative declaration of the need of a Blue Sky Law, and of a desire that the law shall not be declared invalid because some regulation or provision for the administration thereof cannot be sustained.

As heretofore stated and emphasized we believe the general plan of the law is good and should be sustained. Many of the details of administration do not affect the general plan and working of the law. If any of these should be found to be invalid this Court may so declare without suspending the whole law, and this should be done.

Conclusion.

The appellants in this case have been put in a position of being obliged to defend a statute against only general attacks upon its constitutionality. Necessarily they cannot anticipate every line of attack, and may perhaps have defended against attacks which will not be made by appellees. We have tried to emphasize the need of an efficient Blue Sky Law as seen from the struggle of so many states to secure such a law. The states have tried to profit by the decisions of the Federal Courts so far as they have indicated the limits of such legislation. It is hoped that this Court will further clarify the situation by its decision in this case and other cases involving similar statutes which are to be submitted at about the same time. We firmly believe that it should be established by these decisions that the principle of reasonable inspection may be applied by the states to transactions in stocks and securities.

Moreover, we believe that this precise case should be reversed. The appellees should not be relieved under the statute from an inspection of the stocks that they are attempting to sell. If any provisions of the law are invalid and should

not be enforced against appellees, at least only the enforcement of such invalid provisions should be enjoined. It should not be presumed that the officers of this state will enforce invalid and unconstitutional provisions of the law, and without an affirmative showing that the officers were threatening to enforce such invalid provisions (if there are any) in the law, injunction should not be granted. These considerations require either the entire reversal of the decree of the District Court or at least its substantial modification and we ask that this Court grant appellants this relief.

Respectfully submitted,

CLARENCE C. CALDWELL,

Attorney General of South Dakota.

BYRON S. PAYNE,

Assistant Attorney General.

ATTORNEYS FOR APPELLANTS.

APPENDIX.

States Having Blue Sky Laws.

The "Blue Sky Department" of the State of Kansas has furnished us with a list of twenty-six states having "Blue Sky Laws". We give the list below. We have also looked up and have given so far as we had access to the statutes of the several states the citations to such Blue Sky Laws. In a few instances we did not have access to the late statutes of the state.

Arizona

Arkansas

California, Chap. 353, laws 1913.

Connecticut, Chap. 293, laws 1911.

Florida, Chap. 6421, laws 1913.

Georgia, Laws 1913, No. 263.

Idaho, Chap. 117, laws 1913.

Iowa, House File No. 351, Session laws 1915.

Kansas, Chap. 133, laws 1911. Am. C. 141, 1913.

Louisiana.

Maine.

Michigan, P. A. Mich. 1915 No. 46.

Missouri, Act Approved April 7th, 1913.

Montana, Chap. 85, laws 1913.

Nebraska, Chap. 199, laws 1913.

North Carolina, Revisal Sec. 4805, and chap. 196, laws 1911,
and chap. 156, laws 1913.

North Dakota, Chap. 109, laws 1913.

Ohio, 104 Ohio Laws, 110.

Oregon, Chap. 341, laws 1913.

South Carolina (?)

South Dakota, Chap. 275, laws 1915.

Tennessee, Chap. 31, laws 1913.

Texas, Chap 32, laws 1913.

Vermont, No. 170 Acts 1912.

West Virginia, Chap. 15, laws 1913.

Wisconsin, Chap 756, laws 1913.

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BRIEF FOR APPELLEES

Supreme Court of the United States

October Term, 1915

No. 386

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL
FOR THE STATE OF SOUTH DAKOTA, AND EX-
OFFICIO MEMBER OF THE STATE SECURITY
COMMISSION OF THE STATE OF SOUTH DA-
KOTA, ET AL., APPELLANTS

THE SIOUX FALLS STOCK YARDS COMPANY, WIL-
LIAM AND HARRY MORLEY, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF SOUTH DAKOTA

No. 28145

GEORGE J. DANFORTH,
HUGH S. GAMBLE,
FRANK McLAUGHLIN,

Attorneys for Appellees.

Edward E. Wagner
Of Counsel

RECIPE FOR APPLIQUES

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2. Cut it into four equal parts.

3.

4. Take a piece of white cloth, 12 inches square.

5. Cut it into four equal parts.

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No. 25143

Supreme Court of the United States

October Term, 1916

No. 860

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL
FOR THE STATE OF SOUTH DAKOTA, AND EX-
OFFICIO MEMBER OF THE STATE SECURITIES
COMMISSION OF THE STATE OF SOUTH DA-
KOTA, ET AL., APPELLANTS,

vs.

THE SIOUX FALLS STOCK YARDS COMPANY, WIL-
LIAM AND HARRY MORLEY, APPELLEES.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE.

The appellants in this case have correctly stated in their brief the proceedings previously had in this action. We shall, therefore, not enlarge upon their statement, but shall briefly summarize the provisions of the South Dakota Act (Chap. 275, Laws of S. D., 1915), brought in question by this appeal.

A brief summary of the provisions of the Act are as follows:

The title states that it is an Act to prevent fraud in the sale and disposition of stocks, bonds or other securities, and providing for the enforcement thereof and creating a State Securities Commission.

Section 1 of the Act creates a commission and makes the members of the Commission, the Attorney General, Insurance Commissioner and the Public Examiner of the State.

Section 2 makes the Act apply to all persons, co-partnership, corporation, company or association whether domestic or foreign, and if foreign the company is known as a foreign investment company.

Section 3 provides for certain exemptions from the Act, which in substance are as follows: 1. Government and municipal securities. 2. Unsecured commercial papers. 3. Railroad securities. 4. Securities of banks and loan associations, (even though they may have large quantities of

stock and bonds for sale). 5. Mortgages. 6. Increase of stock to stockholders. 7. Securities listed in a standard manual of information if approved by the Commission (the Commission may suspend even the sale of standard securities under this provision temporarily or permanently, so this exemption really amounts to nothing). 8. Isolated transactions.

Section 4 provides in part what information must be furnished to the Commission as follows: 1. Statement in detail of its plan of business. 2. Copies of all contracts, stocks or bonds. 3. Copy of its prospectus. 4. Copy of its proposed advertisements. 5. Name and location of its main offices. 6. Names of its officers. 7. Itemized account of its financial condition. 8. An account of its liabilities and assets. 9. *Such other information as the Commission may require.* 10. If a foreign corporation, it must furnish a copy of the law under which it was incorporated. 11. A copy of its charter. 12. A certificate that it is authorized to do business in a foreign state. 13. Copies of its constitution and by-laws. 14. Amendment to its constitution or by-laws. 15. All papers relating to its organizations.

The Section then provides for a fee ranging from \$10 to \$100.

Section 5 of the Act requires that all papers sent to the Commission, either be verified by proper officers or certified by public officials.

Section 6 provides that the applicant must *file its irrevocable consent that suits may be commenced against the applicant by service of summons upon the Public Examiner.*

Section 7 provides for the time of hearing the applications.

Section 8 authorizes the Commission to require further information than the information required in the foregoing sections, and authorizes the Commission to make an appraisal of all the property of the applicant and this appraisal is to be made at the expense of the applicant.

Section 9 authorizes the Commission from such papers, etc., as are required by the Act to find, that the contracts of the applicant are fraudulent *or to find that such papers, contracts and bonds would in its opinion work a fraud on the purchaser.* The Commission is then authorized to deny absolutely the right to sell any stock or bonds, or it may approve the right to sell stock and bonds to a limited amount, and give a permit limiting the amount of stock, bonds, etc., which may be sold thereunder.

Section 10 defines a dealer in stock.

Section 11 requires a dealer to furnish practically the same information as required of corporations, etc.

Section 12 requires an additional fee for agents who may sell.

Section 13 requires the manner of keeping accounts, and permits applicants after they have a permit to be examined by an examiner *at the expense of the company*, and if the company fails to permit such examination it forfeits its right to sell stock and authorizes the Commission, *without previously any action, after such examination, to absolutely suspend the right to sell stock.*

Section 14 makes it unlawful to use in the sale of stocks and bonds, *any other contracts or circulars than those that have been approved by the Commission.*

Section 15 requires *dealers* to comply with all the provisions of the law, unless the corporation has already complied.

Section 16 gives unlimited discretion in the Commission to advertise the condition of any company.

Section 17 leaves Banks and Insurance Companies under the control of the Public Examiner and Insurance Commissioner.

Section 18 provides for a seal.

Section 19 makes it a misdemeanor to furnish false statements.

Section 20 authorizes the Commission to furnish information to the public upon the person making inquiry paying the cost.

Section 21 requires an annual statement under penalty of forfeiture of all rights to sell stock.

Section 22 authorizes certiorari proceedings.

Section 23 provides for a maximum penalty of a fine of \$1,000.00 and one year in jail.

THE ACT DENIES TO THE APPELLEES DUE PROCESS OF LAW.

Section 2 of Article 6 of the Constitution of the State of South Dakota provides: "No person shall be deprived of life, liberty or property without due process of law."

The Fourteenth Amendment of the Constitution of the United States provides:

"No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

There will be no dispute between counsel for the appellants and counsel for appellees upon the proposition that the appellees cannot be deprived of their property "without due process of law." It will simply be a difference in applying the principle and the facts in this case.

In the case of *Allgeger v. Louisiana*, 165 U. S. 578, this Court stated:

"The liberty mentioned in that amendment (referring to the Fourteenth Amendment) means not only the right of a citizen to be free from mere physical restriction of his person as by incarceration, but the term is deemed to embrace the right of a citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary or essential to his carrying out to a successful conclusion the purposes above mentioned."

In the case of *Butchers Union Company vs. Crescent*, 111 U. S., 746, this Court further stated:

"The right to follow any of the common occupations of life is an inalienable right. It was formulated by such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

In *Powell vs. Penn.*, 127 U. S., 678, this Court held; that the acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment.

See also *Buck Store Co. vs. Vickers*, 226 U. S. 205.

Ex Parte Young, 209 U. S. 123.

Minnesota Rate Case, 230 U. S. 352.

Lawton vs. Steele, 152 U. S. 133.

William R. Compton Co. vs. Allen, 216 Fed. 537.

Alabama & N. O. Transp. Co. vs. Doyle, 210 Fed. 173.

Bracey vs. Darst, 218 Fed. 482.

N. W. Halsey & Co. vs. Merrick, 228 Fed. 805.

Greiger-Jones Co. vs. Turner, 230 Fed. 233.

From the expressions of the Courts in the foregoing cases, it is self evident that there can be no justification in

the law in question, unless it comes within some exception to the general rule, and that exception is to be determined by whether or not the law falls within what is termed the "police power" of the State. The learned Attorney General argues that the legislature of the State, has not conferred upon the State Securities Commission strictly judicial functions; that the State Securities Commission is a sort of administrative board vested with discretionary powers to determine questions necessarily incident to its administrative duties. From his own interpretation of the Act as thus stated, he reaches the conclusion that the Act in question does not deprive the appellees of property without due process of law, nor deprive them of equal protection of the laws. His argument is necessarily based in the first instance upon the theory that the sale of stocks and bonds is a subject that comes within the usual inspection statutes which have been held valid under the police power granted to the several states. The primary question is whether the sale of stocks and bonds and other securities is of such a nature as to threaten the public safety, or the lives, health and morals of the inhabitants or the welfare of the community in general.

Is it the welfare of the community that is to be protected by the law in question, or is it the welfare of the comparatively few individuals who buy stocks and bonds that are sought to be protected by the law? If it is not the welfare of the public at large, the law must of necessity fail. The argument of the Attorney General has been answered by all the Judges of the Federal Courts, who have been called upon to pass upon laws similar to the Act in question.

In *Alabama N. O. Transp. Co. vs. Doyle*, supra, the Court discussed this question and stated as follows:

"It is enough now to remember that the prohibition in question has to do with transactions *predominately private*, and not those which are affected by a public interest which arose from public grant, or which exist by sufferance. This statute does not deal with common carriers, grain elevators or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers and the like. The issuing of commercial paper, stocks or bonds by a private company to get money for its own business, no one can suppose is a public or quasi-public enterprise. The business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a

private business, the question at once presents itself whether frauds and opportunities for fraud, sufficiently characterize the business to justify its entire prohibition, save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that as compared with the total dealings in securities covered and contingently prohibited by this Act, those which may fairly be suspected to be of a fraudulent character, are a very trifling proportion, and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations.

In *William R. Compton Co. vs. Allen*, supra, the Court stated in referring to a similar law in the State of Iowa:

"It must be held, the subjects of Interstate Commerce therein sought to be regulated and controlled are not only burdened by the Act, but are directly burdened thereby, and that such *articles* (referring to stocks and bonds) *are not the subject of state inspection laws*."

A complete analysis of the provisions of the act in question shows that this is not a law to prevent fraud in the sale of stocks and bonds. It is a law designed and designated for the sole purpose of regulating the control of the sale of stocks and bonds to a point of absolute prohibition. What power or authority is given to the commission to prevent the fraudulent sale of stocks and bonds to purchasers after the permit has been given to the corporation, individual or association? The stocks and bonds that are sold under the permit given by the commission are no more protected against the fraud and deceit of the agent in selling the same to some purchaser than are the sale of stocks and bonds that are sold without a permit. Nowhere in the statute is there any penalty whatsoever for the sale of stocks and bonds by reason of fraud. The law is purely an attempt to regulate profit and loss and to try to guarantee to the citizens of South Dakota a possible mistake in judgment in the purchase of stocks and bonds. It is simply an effort to prevent the citizens of this state from entering into a legitimate enterprise for gain, if they so desire, and to guard their pocketbooks. The law does not provide any penalty for fraud, but simply contains a prohibition against and provides a penalty for tendering for sale an article of commerce, however honestly it may be tendered. Herein lies the vice of the statute, and herein does it differ from all laws regulating commercial transactions, which have been upheld by the court under the guise of police regulations, and an examination of the six indictments against the appellees in this case attached to the bill of complaint, and ap-

pearing in the printed record, show absolutely that the law in question in no shape, manner or form protects citizens against fraudulent practices in the sale of stock. The appellees in none of the cases were charged with having perpetrated any fraud. They were simply charged with having done what has been recognized as lawful for a century or more, and then because they failed to comply with the drastic provisions of the Act, they are prosecuted under the Act, but not prosecuted for fraud.

From an analysis of the law, it is self evident that the State Securities Commission is not merely an administrative board vested with certain discretionary powers, but that it is rather a Court before which evidence must be taken, examined and weighed, and with authority greater than was ever conferred upon any judicial tribunal in this country.

The *very right to make a contract is taken away* from the individual unless the individual or corporation or association receives the stamp of approval of the Commission upon the contract.

Section fourteen of the Act in part provides as follows:

"It shall be unlawful for any investment company or dealer or its or his agents, to issue, circulate or deliver any advertisements, pamphlets, circulars, prospectus or other document in regard to its stocks, bonds, *contracts* or other securities in the State of South Dakota differing in any way from the copy filed with said Commission as provided by this Act, nor until the same has been approved by the Commission."

Section four of the act shows what information must be furnished the Commission. Sub-division nine of said section authorizes the Commission to obtain any other information that it may require. Section six provides that the applicant must file its irrevocable consent that suits may be commenced against the applicant by service of summons upon the Public Examiner. Section thirteen authorizes the Commission at any time to examine any company or corporation that has already complied with the Act at the expense of the Commission. Other equally drastic provisions appear in the Act.

Can it be said after reading the Act in question, that the said Securities Commission of the State of South Dakota is purely an administrative board? No such power was ever conferred upon any court. As was stated in *Alabama & N. O. Transp. Co. vs. Doyle*."

"If a company is organized to make and sell a new invention, and if the Commission thinks the enterprise will not succeed, the stock may not be sold even to skilled bankers who have investigated thoroughly and still do

sire to buy. If through local pride or in the effort to save an existing investment or for any direct benefit, should the citizens of a town wish to take stocks or bonds in the local company, though knowing they are likely to lose their investment, and being willing to take the chance, yet they may not,—this law forbids.”

The learned Attorney general argues, “he must be indeed unread and uninformed that has not been impressed with the great development in these later years of the business of selling stock and securities. It is a part of the commercial growth of the country.” We readily agree with that statement of the Attorney General, but inquire whether the time has now arrived when what the Attorney General sees fit to call an administrative board is given the power to block this business, which has become a part of the commercial growth of the country, and whether this administrative board can set up its judgment upon investments against the judgment of skilled business men, bankers, brokers and many others who are experts upon investments in such securities, simply because of occasional fraud practiced in the sale of such securities. For a century or more the business of trading in horses has been recognized as a line of business in which fraud was frequently practiced. There would be just as much sense in having the State Securities Commission put its stamp of approval upon every horse trade as there would be to have the State Securities Commission set up its judgment against the skilled investor, simply because an occasional person has lost his money by reason of a stock transaction.

The Supreme Court of the State of South Dakota has answered the argument of the Attorney General in the case of *Ex Parte Hawley*, 22 S. D., 23. In that case the legislature of the State of South Dakota sought to regulate under the guise of police regulations, the sale of nursery stock in this State. In that case the Supreme Court of South Dakota quoted with approval these words from the case of *Mugler vs. Kansas*, 123 U. S. 661:

“The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to

so adjudge, and thereby give effect to the constitution."

The Nursery Law under discussion by the Supreme Court of the State of South Dakota, required those who sought to engage in the sale of nursery stock, to secure a certificate of integrity and responsibility, so as to show the good faith of the applicant before he could secure a permit to engage in the business. When the law in question is analyzed, it is almost identical with the Nursery Law in that the so-called administrative board is in effect obliged to issue its certificates of integrity and responsibility for those who engage in the business of selling stocks and other securities. We presume from the argument of the Attorney General, that if twenty-six states had passed similar nursery laws, that the law for that reason should have been upheld by the Supreme Court of the State of South Dakota. The South Dakota Court answers the Attorney General's argument in these words:

"Certainly it cannot confer upon the Board of Agriculture a power which itself does not possess, as was in effect attempted by the provisions authorizing such board in the exercise of an indefinite discretion to refuse permits on the ground of the applicant's want of financial ability. It is true this Court has sustained a statute conferring unlimited authority upon County Commissioners to accept or reject local license bonds, but the decision was placed on the ground that the business of selling intoxicating liquors is not one of natural right, but one which may be restrained or entirely prohibited by the State. *Burke vs. Collins* 18, S. D., 190. Such is not the character of the business here involved. We are now dealing with a business or occupation which in itself is universally recognized as innocent, and useful to the community in which it is conducted, notwithstanding the nature of the articles sold may render detection of fraud and misrepresentation difficult. Doubtless there are dishonest men in the nursery business. There are such men in all lines of business, professions and occupations. All nursery men are not dishonest. The business itself is not harmful. On the contrary, and especially in this State, the production of trees, flowers and all forms of healthful plant life is beneficial and should be encouraged."

What was said by the Supreme Court of the State of South Dakota, applies with full force and effect in this action. The business of buying and selling stocks and bonds, and other securities, is not harmful, in fact it is one of the

things that has promoted "the commercial growth of the country."

In *Grieger-Jones Co. vs. Turner*, and *N. W. Halsey & Co. vs. Merrick*, supra, similar laws were discussed, and all held unconstitutional, and in *Bracey vs. Darst*, supra the Court stated:

"So far as we know, the states uniformly have criminal statutes against the procurement of money or things of value under misrepresentation, false pretenses and fraud, and the civil right of the victim to recover back the money or property so secured, is universally upheld and enforced."

Can it be said in the face of all these decisions, and in the face of the drastic regulations and burdens imposed by the Act, that this Act does not deprive the appellees of their property and rights of property without due process of law?

THE ACT IS UNLAWFUL INTERFERENCE WITH INTERSTATE COMMERCE.

It is urged in this case by the appellants that no interstate transaction is involved. The Courts, however, have taken an adverse view of the matter, and it is now settled by many decisions that the dealing in stocks and bonds of a foreign corporation, constitutes an interstate transaction.

In the case of *Butler Bros. Shoe Co. vs. U. S. Rubber Co.*, 156 Fed. 1, Judge Sanborn stated:

"All interstate commerce is not sales of goods, importation into one state from another is the indispensable element. The test of interstate commerce and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information is a transaction of interstate commerce.

In *Bracey vs. Darst*, the West Virginia case hereinbefore cited, the Court stated:

"We do not think it can be longer questioned that stocks, bonds, debentures and other securities, are subject matters of interstate commerce."

And many cases are cited in the opinion.

In *William R. Compton vs. Allen*, heretofore cited, the Court stated:

"We have no doubt but that Court (Supreme Court of the United States), when presented with the question, will decree such securities and property rights,

negotiable and otherwise as are sought to be regulated by the Act in question, are proper subjects of interstate commerce."

In *Greiger-Jones Co. vs. Turner*, the Ohio case hereinbefore referred to, the Court stated:

"Utterances emanating from the Supreme Court, and express rulings by lower Federal Courts, established beyond all reasonable controversy that stocks and bonds whose disposition is subject to the provisions of the Act, are articles of legitimate interstate commerce."

In the case of *N. W. Halsey & Co. vs. Merrick*, the Michigan case already cited, the Court held the law unconstitutional upon the express ground that it constitutes a direct interference with interstate commerce.

In the case of *Cutlin & Powell vs. Schuppert*, 110 N. W., 818, the Supreme Court of the State of Wisconsin held that the sale of stocks is a transaction in interstate commerce.

In the case of *Hatch vs. Beardon*, 204 U. S. 152, the Supreme Court stated:

"A stock certificate is more than evidence—it is a constituent of title."

The learned Attorney General and his able assistant argued that there is no distinction between an insurance policy and a stock certificate. In this the appellants are mistaken for they fail to recognize the fact that when certificates of stock are issued, that they become personal property, and are as much the subject of sale and transfer as any other article of commerce. The whole business world now recognizes that stocks and bonds and securities of a like nature are articles of commerce to be dealt in from day to day, and to hold that they are not articles of commerce within the meaning of the constitution is to run counter to all modern business methods.

In this case, Section 6 of the Act in question requires "every foreign investment company before offering for sale any of its stocks, bonds, investment contracts or other securities in this state shall also file its irrevocable written consent that suits and actions may be commenced against it in the proper court of any county in this state in which a cause of action may arise, or in which the plaintiff may reside, by the service of any process or pleading authorized by the laws of this state on the Public Examiner of the State of South Dakota, etc."

In the case of *International Text Book Co. vs. Pigg*, 217 U. S. 91, the principle involved in this case was decided by the Supreme Court of the United States. That was a case which arose in the State of Kansas under a law which provided that a foreign corporation could not do business in

Kansas until it made application to the State Charter Board for permission to engage in business in that State as a foreign corporation; that it should pay a fee of Twenty-five Dollars, and should file in the office of the Secretary of State its written consent irrevocable, that process against it might be served by being served upon the Secretary of State. The Charter Board was authorized to make special inquiry in regard to the solvency of the corporation, and to determine whether it was properly organized, and whether its capital stock was unimpaired. The law also provided for an annual detailed statement to be delivered to the Secretary of State, and that statement should set forth the capital paid up, the par value, the market value, the statement of its assets, statement of its liabilities, list of its stockholders, the number of shares held by each, the names and post office addresses of the officers and the manner of their election, and if it failed to file such statement, the corporation then forfeited its right to do business in the state.

The provisions of that Act are almost identical with the provisions of the Blue Sky Law of this State so far as it involves one of the principles of this case. The Supreme Court of the United States reached the conclusion absolutely that the law was unconstitutional and interfered with the business of interstate commerce. In that case the dealings of the corporation were almost entirely by mail. We quote the following from the opinion:

"In the first place it is made a condition precedent to the authority of a corporation of another state, except banking, insurance and railroad corporations to do business in Kansas, that it shall prepare, deliver and file with the secretary of state a detailed statement showing the amount of the authorized, paid up, par and market value of its capital stock, its assets, and liabilities, a list of its stockholders with their respective post office addresses and the shares held and paid for by each, and the names and post office addresses of the officers, trustees, or directors and managers. In the next place the statute denies to the corporation doing business in Kansas the right to maintain an action in a Kansas court unless it shall first obtain a certificate of the Secretary of State to the effect that the statement required by section 1283 has been properly made."

In view of the decision, it appears to us that this question has already been settled by this Court, for the provisions of the South Dakota Statute are almost identical with the provisions of the Kansas Act held unconstitutional

as being an interference with interstate commerce, by this Court.

The very Act herein questioned recognizes the fact that stocks, bonds and securities are subjects of barter and sale. Section Four of the Act provides: "Before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner whatever in this state, any stocks, bonds, etc.," the sale shall be void unless the Act is complied with. If stocks are not the subject of barter and sale, why prohibit or regulate their barter and sale? If they are the subject of barter and sale, by what possible reasoning can it be made to appear that they are not articles of commerce?

THE STATUTE DENIES TO THE APPELLEES THE EQUAL PROTECTION OF THE LAW.

The statute under consideration exempts state and national banks and loan associations and certain other classes.

In *Barret vs. Ind.*, 229 U. S., 226, the United States Supreme Court stated: "The equal protection of the laws requires laws of like application to all similarly situated. * * * The legislature is permitted to make a reasonable classification, and before a court can interfere with the exercise of its judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others who it leaves untouched."

If we apply that doctrine to this case, we then ask, is there a fair reason for the extension of this law to the appellees, while national banks, savings and private banks, loan associations and trust companies, etc., go untouched by its provisions? We would like to know what is the difference between the securities held by the excepted class, and the securities held by other dealers? In fact possibly the great bulk of such securities throughout the country is held by banks as collateral security, and for other purposes. Why should those who are in the excepted class be entirely exempt from the provisions of the Act? Is there any difference of which the Court can take notice which presents a just and natural reason for the distinction made by the law for these privileges? The very fact that those in the excepted class are favored by the law, makes it self evident that the law upon its face has nothing to do with the matter of fraud in the sale of stocks, bonds and other securities. The law is, therefore, discriminatory and denies to the appellees the equal protection of the laws.

It further appears by the bill of complaint and the answer that the appellee, corporation, has complied with

the laws of the State of South Dakota relating to foreign corporations, and the state has authorized it to do business in this state. After it has granted that permit, it then imposes the additional burden of requiring it to comply with all of the provisions of the so-called Blue Sky Law, and in that regard this law denies to the appellee, corporation, the equal protection of the laws of the State of South Dakota.

THE ACT ATTEMPTS TO DELEGATE BOTH LEGISLATIVE AND JUDICIAL POWER TO THE STATE SECURITIES COMMISSION, AND IS NOT AN INSPECTION LAW.

The power given under the various sections of the Act in question make it apparent that the act confers both legislative and judicial power upon the State Securities Commission. Under Section Four of the Act the applicant may be required by the commission "to furnish such other information as the commission may require." What such other information that the Commission may require may be, is left absolutely undetermined.

Section Eight authorizes the Commission to require still further and additional information and appraise the property of the applicant at the applicant's own expense.

Section Nine leaves the question of fraud purely as a matter of the opinion of the Commission and gives the Commission arbitrary power without any standard being fixed to deny the applicant the right to sell stocks and bonds.

Section thirteen requires the applicant, even after a permit has been granted, to sell stock, to keep its or his books in a certain manner and permit an examination of such books at it or his expense, and for failure so to do the right to sell stock is forfeited. Under this section if the Commission does make an examination, the arbitrary power is given to suspend absolutely the right to sell stock, even if the permit was given in the first instance.

Section Sixteen also gives the Commission an unlimited discretion to advertise the condition of the company. These and various other sections of the act establish conclusively that there is absolutely *no standard of rules* by which the Commission is to be guided in passing its judgment or in making its findings. It is, therefore, an unlawful delegation of legislative and judiciary power. If a permit is given under the Act, without any standard being fixed, the Commission has power to take away that permit. This statute in many respects is similar to the statute enacted in South Dakota, which attempted to delegate to the Insurance Commissioner of the State, the power to draft "a standard" fire insurance policy when the legislature had failed to fix or provide the provisions to be incorporated in said policy.

The Supreme Court of the State of South Dakota in the case of *Phoenix Insurance Company v. Perkins*, 101 N. W. 1110, held unconstitutional such a law, and stated:

"It is here that the inherent inefficacy of an attempt to clothe any state officer with power to make or provide an exclusive form of policy becomes apparent. Conditions which the law requires to be in all fire insurance policies, do not express the consent of uninterested parties. They have the force and effect of law, and cannot be abrogated by agreement or rendered nugatory by waiver. The power to prescribe such conditions is legislative."

In the case of *Sioux Falls vs. Kirby*, 6 S. D., 62, the Supreme Court of South Dakota stated in reference to a certain ordinance requiring a permit to build upon one's property:

"It is clear that the ordinance in controversy upon its face attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but as to make his absolute enjoyment depend upon the arbitrary will of the city inspector, from whose decision no appeal is given. Such an ordinance cannot be sustained."

In the case of *Hewitt vs. Board of Medical Examiners*, 84 Pac., 39, the California court used these words:

"No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business, nor is there any definite rule declared whereby, after such an advertisement is had the Board of Medical Examiners shall be controlled in determining its impropriety, and the provision of the Act, even as to the judgment of the board, furnishes no standard by which that determination shall be arrived at."

In the case of *Mathews vs. Murphy*, 163 S. W., 785, the Act provided that a physician's license might be revoked "for grossly unprofessional conduct of a character likely to deceive or defraud the public." The Act was held unconstitutional because no standard had been prescribed to determine whether any given conduct was or was not unprofessional.

In the case at bar, the law distinctly provides that all that is necessary for the Securities Commission to find is that in its opinion the sale of stocks, bonds, etc., might work fraud upon the purchaser. A pure and absolute discretionary power is given to the commission. First, as to the granting of the permit, and: Second, as to the revocation of the permit after it is granted. There is no standard

fixed to guide the commission in granting the permit, nor is there any standard prescribed as the reason for the revocation of the permit.

See also *Halsey & Co. vs. Merrick*, the Michigan case hereinbefore cited, in which this very question was discussed and decided adversely to the appellants.

The true test in such a case was stated by the Supreme Court of Wisconsin in *State vs. Burdge*, 37 L. R. A., 157, as follows:

"The true test and distinction whether a power is strictly legislative or whether it is administrative and merely relates to the execution of the statute is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of law. The first cannot be done, to the latter no valid objection can be made."

The learned attorney general and his able assistant by a species of original logic, have discovered that the act in question is simply a harmless inspection law wherein and whereby securities may be inspected by having certain data furnished to the commission. From this data this almost omnipotent commission is then to determine for the experienced banker, broker or investor, whether he ought to invest in certain securities or not. The simple use of the word *inspection* in this connection refutes the argument advanced.

In *Turner vs. Maryland*, 137 U. S. 38,, 27 Law Edition, 370, the Court stated:

"The object of inspection laws is to improve the quality of *articles produced by the labor of the country*, and fit them for exportation, or it may be for domestic use."

It is indeed a novel syllogism that produces a conclusion that stocks, bonds and securities belong within that well known class of articles produced by the labor of the country for general use or consumption. If we are willing to concede that the public generally eat stocks and bonds, or use them as other food, and like products are used, then we would have to concede that the Attorney General is right, otherwise not.

In this connection it is then urged, that because 26 states have passed somewhat similar laws that there is a crying need for this kind of legislation, and for that reason constitutional government should yield to socialistic tendencies. In South Dakota our legislation^{and} has seriously considered the passage of an act regulating the length of ladies hat pins.

Similar bills have been considered by other legislative bodies. By the same logic, the crying need of that character of legislation would become apparent. The appellants overlooked the fact that the approval of the Securities Commission in no manner raises the standard of the security offered for sale as does proper inspection laws. The giving of the permit by the Commission simply gives to the dishonest stock salesman, an addition argument when he "paints in glowing colors the contemplated success of his proposed enterprise," for the dishonest stock salesman then argues that the securities which he is offering for sale have the *approval and the backing of the State*. Instead of preventing fraud, the law has to the writer's own knowledge promoted fraud.

SPECIAL PROVISIONS OF THE ACT.

Under Section Three of the Act, it is provided that the Act does not apply to isolated transactions. This in connection with what we have already stated emphasizes the fact that this is a law not enacted to prevent fraud, and that the title is a misnomer. Under that provision the writer of this brief might well sell to the Attorney General in the State of South Dakota certain stocks and other securities, and practice the most pernicious fraud in such sale, but as long as such sale remained an isolated transaction, the writer could not be prosecuted under the provisions of the Act. The Attorney General might well sell to the writer of this brief and some three or four other individuals within the State of South Dakota, the most valuable securities without practicing any fraud or deception, and the purchasers of such securities might all profit by the investment made. The Attorney General should he make such sales within the jurisdiction of the State of South Dakota, renders himself amenable to the provisions of the law, although he practiced no fraud, and the writer of this brief having practiced a pernicious fraud could go "scot free," under this very law enacted under a title which purports that this is a law to prevent fraud.

This law also exempts securities appearing in a standard manual of information. An examination of that provision reveals the fact that the Commission, however, must approve the manual. What if they do not approve? The absolute discretion is vested, and if approval is granted the Commission can arbitrarily set aside its approval, make an examination and require all the information required in other cases.

Section Eleven of the Act applies to dealers, and requires the dealer to comply with the law, unless the cor-

poration or association has already complied. What is the result of this provision? A stock broker in the State of South Dakota might have in his possession a dozen different kinds of valuable securities which he desired to sell honestly to the citizens of the State of South Dakota. The corporations or associations that had originally issued such securities no longer have any interest in the securities as they belong either to the stock broker or other private individuals. The corporation or association has no interest in complying with the law, and there is no reason why such corporation or association should pay a license fee or furnish the information required. In fact the corporation or association might and undoubtedly would, refuse to submit to an examination. The dealer would then have to comply with the provisions of the law required of the corporation or association for each particular class of stock which he had in his possession before he could enter into the ordinary field of commercial transactions which even the Attorney General recognizes as one of the things that has contributed to the great development and growth in this country in recent years. We would like to inquire how the stock dealer could comply with the law, if the corporation which originally issued the securities refuses to be examined?

Section Thirteen of the Act authorizes the commission to make an examination of an investment company, and authorizes them to charge Ten Dollars a day for each day or fraction thereof that the examiner is absent from the Capitol Building of the State, and also requires the investment company to pay the travelling and hotel expenses of the person making the examination.

The Attorney General argues that the fees are in no manner excessive. If an examiner sent out under this law were to examine some Eastern corporation for some dealer who held a few stocks or bonds for sale in the State of South Dakota, the amount that would be required to be paid would be no small item, in fact it might amount to several hundred dollars. If there is a refusal to submit to such an examination, the right to sell stocks or bonds is at once forfeited. No other inspection law has any such provision. The fees required to be paid are not based upon the amount of stock that it is proposed to sell, but are based upon the assets of the investment company.

Section Fourteen of the Act which has already been referred to, make it unlawful for any investment company or dealer to issue, circulate or deliver any advertisements, pamphlets, circulars, prospectus or other documents in regard to its stocks, bonds, contracts or other securities in the State of South Dakota, differing in any way from the

copy filed with said commission, nor until the same has been approved by the Commission. Was there ever any inspection law that contained any such provision as the provision contained in that section? The right to advertise, the right to contract, the right to transact business is made dependable upon the arbitrary will of what must of necessity be an omnipotent commission.

We expected that it would be urged that this act might be called the act of licensing a business or occupation, for there is some intimation in the Act that it applies to the engaging in the business of selling stocks, bonds, etc. Section Four of the Act answers any such argument, for it applies to every sale or subscription, etc., unless within the excepted provisions.

The Attorney General suggests that the statute be declared severable, and that the court sustain ^{certain} provisions, although it finds other provisions unconstitutional. If the learned Attorney General had pointed out to this Court what provisions of the Act should be sustained, and what provisions of the Act should be eliminated, then there would be some force in his argument. We have endeavored to analyze the law with care, and all the provisions are so interwoven and involved, that it is absolutely impossible to separate any of the provisions from the law, and sustain such separate provisions as a valid act. The law must either stand or fall in its entirety.

CONCLUSION.

The constitutional guarantees of a free government judicially construed and interpreted by this great court, are the only safeguards against hasty and unwise legislation. By five decisions of lower Federal Courts, property and personal rights have been protected against the assault of state legislators on our constitutional rights. We cannot but feel that this Court will simply reiterate the principle already established by it, that a state cannot under the guise of police regulations, seek to overthrow every constitutional guarantee, and thus deprive a person of his liberty and property.

For the reasons herein expressed we confidently ask that the action of the lower court be affirmed.

Respectfully submitted,

GEORGE J. DANFORTH,

HUGH S. GAMBLE,

FRANK McLAUGHLIN,

Attorneys for Appellees.

OCT 12 1916

JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1916.

No. 386.

CLARENCE C. CALDWELL, AS ATTORNEY GENERAL, ETC.,
APPELLANT,

vs.

THE SIOUX FALLS STOCK YARDS COMPANY
ET AL., APPELLEES.

No. 413.

FRANK W. MERRICK ET AL., APPELLANTS,

vs.

N. W. HALSEY & COMPANY ET AL.

**SUGGESTION THAT SOUTH DAKOTA & MICHIGAN
"BLUE SKY" CASES BE HEARD IMMEDIATELY
AFTER OHIO CASES.**

Comes now the counsel for appellees in case of Clarence C. Caldwell, as Attorney General, etc., Appellant, *vs.* The

Sioux Falls Stock Yards Company, No. 386, and represents to the court that there is now pending upon the call of the court, awaiting argument, the following cases, to wit:

No. 438.

HARRY T. HALL, *Superintendent of Banks and Banking of the State of Ohio, Appellant,*

vs.

THE GEIGER-JONES COMPANY.

No. 439.

HARRY T. HALL, *Superintendent of Banks and Banking of the State of Ohio, Appellant,*

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, *Superintendent of Banks and Banking of the State of Ohio, Appellant,*

vs.

WILLIAM R. ROSE et al.

These cases involve the constitutionality of the so-called "Blue-Sky" Law of the State of Ohio.

That following said Ohio cases upon said call are the following cases, to wit, Nos. 212, 372, 340, 341, and 452, involving questions in no manner connected with the questions involved in the Ohio appeals hereinbefore mentioned.

That following the last-named cases upon the call are cases Nos. 386 and 413, involving the constitutionality of the South Dakota and Michigan so-called "Blue-Sky" Laws. That certain underlying principles to be presented in argument are common to the Ohio cases, South Dakota case, and Michigan case, although the acts differ in detail and in some substantial points. That it will be to the advantage

of both court and counsel if the Ohio, South Dakota, and Michigan cases be presented in consecutive order, and that by so doing all cases will be presented to the court in the most helpful and effective manner. Two counsel for certain of the appellees in the Michigan case, Mr. Wickersham and Mr. Reed, have filed a brief on behalf of the Investment Bankers Association of America as *amicus curiae* in the Ohio cases. They concur in this suggestion.

These cases pending on the call, application was made in open court this morning and the court directed that this suggestion be put in printed form.

Counsel therefore respectfully suggest to the court that the South Dakota and Michigan cases, numbered respectively 386 and 413, be advanced upon the call so as to be heard in argument in their consecutive order immediately following cases Nos. 438, 439, and 440, being the Ohio cases hereinbefore referred to.

Respectfully submitted,

GEORGE J. DANFORTH,
Counsel for Appellers in Case No. 386.

October 11, 1916.

IN THE

JUN 2 1916

JAMES D. OWEN

Supreme Court of the United States

October Term 1915

No. [REDACTED]

386

Caldwell v. Sioux Falls Stock Yards Company

No. [REDACTED]

418

Harriok v. Halsey and Company

No. [REDACTED]

438

Hall, etc., v. The Geiger-Jones Company

No. [REDACTED]

439

Hall, etc., v. Conltrap

No. [REDACTED]

440

Hall, etc., et al v. Boce, et al

Appeals from the District Courts of the United States
of Michigan, South Dakota and Ohio.

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE.**

GRANT FELLOWS,

Attorney General of Michigan

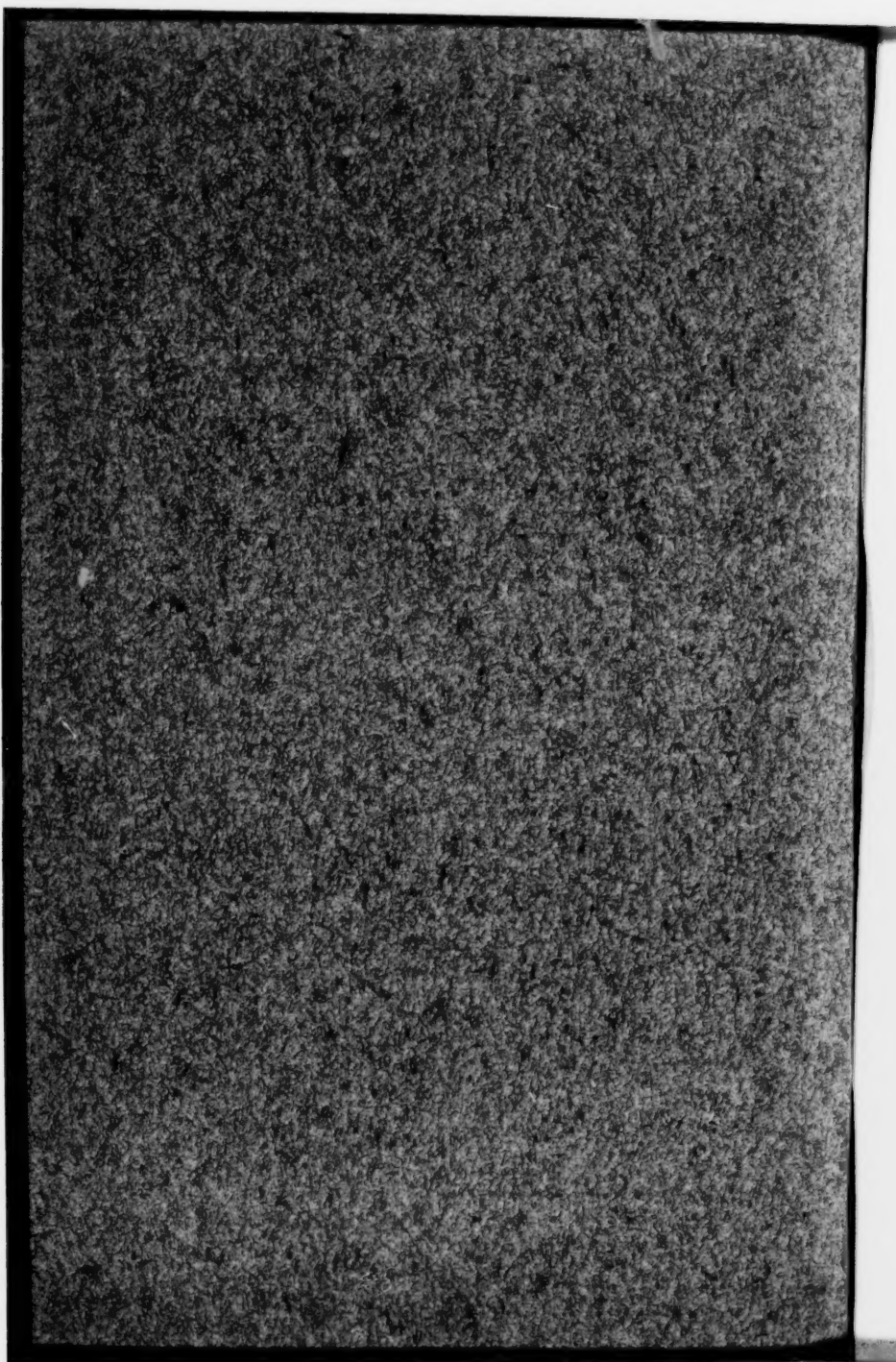
GEORGE COSSON,

Attorney General of Iowa

EDWARD C. TURNER,

Attorney General of Ohio

P. E. TOTHAKER, Law Printer, 10-12 N. Third St., Columbus, O.



IN THE
Supreme Court of the United States

October Term 1915.

No. 860.

Caldwell v. Sioux Falls Stock Yards Company.

No. 900.

Herrick v. Halsey and Company.

No. 941

Hall, etc., v. The Geiger Jones Company.

No. 942.

Hall, etc., v. Coultrap.

No. 943.

Hall, etc., et al v. Rose, et al.

**Appeals from the Districts Courts of the United States
of Michigan, South Dakota and Ohio.**

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE.**

Come now Grant Fellows, attorney general of Michigan, George Cosson, attorney general of Iowa, and Edward C. Turner, attorney general of Ohio, as a duly appointed committee of the National Association of At-

torneys General and respectfully seek permission to file a brief in the above entitled causes as amici curiae.

Said causes involve the constitutionality of the so-called Blue Sky Laws of Ohio, Michigan and South Dakota.

More than twenty states have enacted similar legislation.

After the Federal District Courts of Iowa and Michigan had declared the original Blue Sky Laws of Iowa and Michigan unconstitutional, the National Association of Attorneys General appointed a committee to draft a model law. This committee which was composed of Attorneys General Moose of Arkansas, Fellows of Michigan, and Cosson of Iowa, reported a model Blue Sky Law to the National Association of Attorneys General on December 28, 1914. This model has been followed in the laws adopted by a number of the states, including Michigan and South Dakota.

All of said legislation seeks to protect the citizens of the various states from fraud in the sale of alleged securities.

As the decision in any one of the above entitled causes will in all probability be determinative of the validity of similar laws in other states, we respectfully suggest that this committee, appointed for the purpose by Honorable James P. Tuttle, attorney general of New Hampshire, president of the National Association of Attorneys General, be granted permission to file a brief discussing the general principles underlying this class of legislation.

GRANT FELLOWS,

Attorney General of Michigan.

GEORGE COSSON,

Attorney General of Iowa.

EDWARD C. TURNER,

Attorney General of Ohio.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1915

No.

**SIOUX FALLS STOCK YARDS COM-
PANY**, a Corporation, **WILLIAM MOR-
LEY** and **HARRY MORLEY**,

Plaintiffs and Respondents,

vs.

CLARENCE C. CALDWELL, as Attorney
General for the State of South Dakota
and Ex-Officio Member of the State Se-
curities Commission of the State of
South Dakota; **HARRY O'BRIEN**, as
Insurance Commissioner of the State of
South Dakota, and Ex-Officio Member
of the State Securities Commission of
the State of South Dakota; **JOSEPH L.
WINGFIELD**, as Public Examiner of
the State of South Dakota and Ex-Of-
ficio Member of the State Securities
Commission, and **DAN E. HANSON**, as
State's Attorney of Turner County,
South Dakota,

Defendants and Appellants.

Appeal From the District Court of the United States,
District of South Dakota, Eastern Division.

MOTION TO ADVANCE

Now come the appellants, and move the Court to ad-
vance the above entitled cause for hearing and argument
to an early date convenient to the Court.

In support of the motion to advance appellants re-
spectfully show to the Court:

This action was brought by respondents in the
United States District Court for the District of South
Dakota for the purpose of obtaining a permanent in-
junction against said appellants restraining said ap-

pellants from instituting criminal actions against respondents for violation of Chapter 275, of the Session Laws of the State of South Dakota for the year 1915. An application was made by respondents to the Judge of said Court for a temporary or interlocutory injunction during the pendency of said action. A hearing was had upon the application of respondents for such interlocutory injunction under the provisions of Section 266, of the Act of Congress entitled "An act to codify, revise and amend the laws relating to the Judiciary," approved March 3, 1911, as amended by Act of March 4, 1913 (37 Stat. L. 1013). The Judge of the District Court called to his assistance to hear and determine the application, two other Judges, as provided by said statute, namely, United States Circuit Court Judge Walter H. Sanborn, and United States District Judge Thos. C. Munger, and an order was made in said cause by the said Judges, which granted the application of respondent for an interlocutory injunction, and which restrained appellants from instituting and prosecuting any actions, civil or criminal, against respondents under the aforesaid act of the Legislature of the State of South Dakota, for alleged violations thereof, and from taking any proceedings for the enforcement of said act, against the said respondents. From this interlocutory order of injunction appellants have appealed to the Supreme Court of the United States.

The South Dakota act in question (Session Laws of 1915, page 657) is popularly known as a "Blue Sky Law." It was passed at the 1915 session of the Legislature of South Dakota, was approved March 15, 1915, and went into effect on July 1, 1915. This act creates "A State Securities Commission" to consist of the Public Examiner, the Attorney General and Commissioner of Insurance. It requires every person, corporation, co-partnership, company or association, except those exempted under the provisions of the act, before selling, offering for sale, taking subscriptions for or negotiating for the sale in any manner whatsoever, in the State of South Dakota, any stocks, bonds, investments, contracts or other securities, of its own issue, to make application for a license or permit, and submit certain information and data prescribed by this statute to the said State Se-

curities Commission, and to pay a filing fee prescribed by this statute. The said State Securities Commission shall hear such application, and if in the opinion of such Commission the sale of such contracts, stock, bonds or other securities would work a fraud upon the purchaser, the Commission is authorized to disapprove the sale of same. If, however, said Commission shall not find that the proposed plan of business, or the proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would in the opinion of the Commission work a fraud upon the purchaser thereof, then it is authorized to approve the sale of the same in the State of South Dakota, and issue its certificate to that effect. It is made unlawful for any investment company or dealer or representative thereof, to sell, take subscriptions for or negotiate for the sale in any manner whatever in South Dakota, any stocks, bonds, investment contracts or other securities, unless and until the said Commission has approved thereof and issued its certificate in accordance with the provisions of the statute: Penalties by fine and imprisonment in the county jail are prescribed for violations of the act.

Respondent's Bill of Complaint and Application shows that the complaint, the Sioux Falls Stock Yards Company, is a corporation of the state of Colorado, and that the complainants, William Morley and Harry Morley, are residents and citizens of the State of Iowa. That during the year 1915, both before and after July 1st, of that year, the Sioux Falls Stock Yards Company was engaged in the business of building and constructing a stock yards in the City of Sioux Falls, Minnehaha county, South Dakota, and was engaged at such time in selling certain of its capital stock for the purpose of raising sufficient capital to complete the construction of its said stock yards in the City of Sioux Falls. That the complaints, William Morley and Harry Morley were at such times engaged in the business of selling the stock of the Sioux Falls Stock Yards Company within the state of South Dakota. That in October, 1915, the defendant, Dan E. Hanson, as State's Attorney of the County of Turner, and State of South Dakota, at the instigation and request of the other defendants as members of the

State Securities Commission, caused to be instituted against the complainants criminal proceedings for the violation of the provisions of said Chapter 275, Session Laws of South Dakota for the year 1915, and that the defendants intend and will continue to prosecute the complainants for violations of said statute so long as complainants sell or offer for sale any stock of the Sioux Falls Stock Yards Company within the state of South Dakota. The complainants desire to continue the sale of the securities and stocks of the said Sioux Falls Stock Yards Company within the State of South Dakota, and that the business of said corporation cannot be promoted without the continued sale of its stock. That the acts of defendants under said chapter 275 are depriving complainants of the right to sell the capital stock of said Sioux Falls Stock Yards Company within the State of South Dakota, and deprives them of their property without due process of law in violation of Section 1 of Article 14 of the Constitution of the United States and Section 2 of Article 6, Constitution of the State of South Dakota; that there is thereby denied to the complainants the equal protection of the laws as guaranteed to them by the Fourteenth amendment to the Federal Constitution; that the law imposes a burden upon and practically prohibits interstate commerce, contrary to Section 8 of Article 1, of the Constitution of the United States, and said statutes attempt to vest and delegate to the said State Securities Commission judicial powers unauthorized by law.

The hearing for the interlocutory injunction was had upon the Bill of Complaint, which constituted the showing and application for the complainants. The appellants conceded the correctness of the facts alleged by complainants but contended that same did not constitute grounds for an injunction, thus in effect demurring to the application of complainants. The Court rendered no formal opinion but in the interlocutory injunction Order hereinbefore described, made a finding that Chapter 275, Session Laws of South Dakota for the year 1915, was violative of the Constitution of the United States, basing such finding in the order upon the decisions in *Alabama & No. Transportation Co. vs. Doyle*, 210 Fed. 173, *Wm. R. Compton Co. vs. Allen et al.*, 216 Federal 537, and

Bracey vs. Darst, 218 Federal 482. The issue upon the appeal to this Court as made by the pleadings and record and the decision of the lower Court, is as to the constitutionality under the Federal Constitution of the said South Dakota Statute.

As reason why it is especially urgent and desirable that the cause in this Court be advanced to an early hearing, appellants enumerate the following:

1. That the issues and questions involved in this appeal are matters of public concern to all the people of South Dakota in that they involve the validity of the statute regularly passed and approved, and designed to protect the public against fraud.

2. That public officers of the state are charged with the administration and enforcement of this statute, and such administration and enforcement is seriously embarrassed by the question as to the validity of such statutes raised by the decision of the Federal District Court.

3. That such officers are compelled to take the risk of enforcing an invalid statute, or of allowing a valid statute to remain ignored and unenforced until its validity is determined.

4. That such officers believing in the validity and constitutionality of the statute are insisting upon its enforcement except as they have been restrained by the Court as to the complaints in this case.

5. That investment companies and persons dealing in stocks, bonds and other securities within the State of South Dakota, are being compelled to submit to the provisions of a statute which may be determined to be unconstitutional and void, or to determine for themselves at their peril that same is unconstitutional and void, and take the risk of subjecting themselves to the penalties provided therein.

6. That the situation during the pendency of this appeal, and until the validity and constitutionality of said statute is finally determined, is such as will likely create a multiplicity of suits because of the uncertainty with reference to the validity of the law.

7. That the business of dealing in stocks, bonds and securities of investment companies is very extensive throughout the state of South Dakota; that the number of people engaged in selling stocks and securities of in-

vestment companies is large, all of whom will be directly affected in the determination of the question of the validity of such law. That the business of selling such stocks and securities reaches throughout the entire state in all sections thereof, and extends to all classes of people, and the administration of the law affects the entire people of the state.

8. That more than twenty states of the United States have passed blue sky laws in some form. That the question as to the power of the states to protect its people from fraud in the sale of stocks and securities under these laws is a new question but one of the greatest importance to the people throughout all of these various states. That the demand and need for legislation along this line is shown by the passage of laws to this end in so many states. That it is important and urgent in order to protect the public from fraud that the scope of the authority of the states under the Federal Constitution to legislate along these lines, be determined to the end that power and valid legislation may be secured as far as possible from the states, and to the end that the people, through Congress may supply the needed legislation along these lines where the power to legislate is denied the states.

WHEREFORE, Appellants respectfully submit their Motion together with the foregoing reasons in support thereof.

CLARENCE C. CALDWELL,

Attorney General,

BYRON S. PAYNE,

Asst. Attorney General,

Solicitors for Appellants.

The plaintiffs and respondents in the above entitled action hereby join in the foregoing motion to advance, and respectfully ask that said motion be granted, and they hereby waive all notice of hearing of the same.

R. J. GAMBLE, E. E. WAGNER, and

GEORGE J. DANFORTH,

Solicitors for Respondents.

constitutional and its effect, if the business be continued in disregard of it, will be to visit him with repeated criminal prosecutions involving heavy fines and imprisonment, the remedy at law is not adequate.

A suit to enjoin state officials from instituting criminal proceedings in enforcement of such a statute is not a suit against the State.

Reversed. For decree below see 230 Fed. Rep. 236, note.

THE case is stated in the opinion.

Mr. Clarence C. Caldwell, Attorney General of the State of South Dakota, with whom *Mr. Byron S. Payne*, Assistant Attorney General of the State of South Dakota, was on the brief, for appellants.

Mr. George J. Danforth, with whom *Mr. Hugh S. Gamble*, *Mr. Frank McLaughlin* and *Mr. Edward E. Wagner* were on the brief, for appellees:

The act denies to the appellees due process of law, in violation of the Fourteenth Amendment and the South Dakota constitution, § 2, Article 6.

A complete analysis of its provisions shows that this is not a law to prevent fraud in the sale of stocks and bonds. It is a law designed for the sole purpose of regulating the control of the sale of stocks and bonds to a point of absolute prohibition. The stocks and bonds that are sold under the permit given by the commission are no more protected against the fraud and deceit of the agent in selling them than are those that are sold without a permit. The law is purely an attempt to regulate profit and loss and to try to guarantee the citizens of South Dakota against a possible mistake in judgment. It is simply an effort to prevent the citizens of this State from entering into a legitimate enterprise for gain, if they so desire, and to guard their pocketbooks. The law does not provide any penalty for fraud, but simply contains a prohibition against and provides a penalty for tendering for sale an article of commerce, however honestly it may

be tendered. Herein lies the vice of the statute, and herein does it differ from all laws regulating commercial transactions, which have been upheld by the court under the guise of police regulations.

The State Securities Commission is not merely an administrative board vested with certain discretionary powers, but is rather a court before which evidence must be taken, examined and weighed, and with authority greater than was ever conferred upon any judicial tribunal in this country.

The very right to make a contract is taken away from the individual unless the individual or corporation or association receives the stamp of approval of the commission upon the contract.

For a century or more the business of trading in horses has been recognized as a line of business in which fraud was frequently practiced. There would be just as much sense in having the State Securities Commission put its stamp of approval upon every horse trade as there would be to have it set up its judgment against the skilled investor, simply because an occasional person has lost his money by reason of a stock transaction. *Ex parte Hawley*, 22 S. Dak. 23.

The act is an unlawful interference with interstate commerce. *Catlin & Powell v. Schuppert*, 110 N. W. Rep. 818; *Hatch v. Reardon*, 204 U. S. 152; *International Textbook Co. v. Pigg*, 217 U. S. 91.

The statute denies to the appellees the equal protection of the law. It exempts state and national banks and loan associations and certain other classes.

The act attempts to delegate both legislative and judicial power to the State Securities Commission, and is not an inspection law. *Phœnix Insurance Co. v. Perkins*, 101 N. W. Rep. 1110; *Sioux Falls v. Kirby*, 6 S. Dak. 62; *Hewitt v. Board of Medical Examiners*, 84 Pac. Rep. 39; *Mathews v. Murphy*, 63 S. W. Rep. 785.

In the case at bar, the law distinctly provides that all that is necessary for the Securities Commission to find is that in its opinion the sale of stocks, bonds, etc., might work fraud upon the purchaser. A pure and absolute discretionary power is given to the commission. First, as to the granting of the permit, and, Second, as to the revocation of the permit after it is granted. There is no standard fixed to guide the commission in granting the permit, nor is there any standard prescribed as the reason for the revocation of the permit.

Mr. George Cosson, Attorney General of the State of Iowa, and Mr. Waller C. Owen, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

MR. JUSTICE McKENNA delivered the opinion of the court.

This case was argued and submitted with Nos. 438, 439 and 440, just decided, *ante*, 539, and with No. 413, *post*, 568, which concerns a statute of Michigan of like kind, the opinion in which is to follow. It involves the same general questions as those cases and is presented to review a decree of the District Court enjoining appellants from enforcing a statute of the State of South Dakota relating to the sale of securities. The act (§ 23) makes violations of its provisions a misdemeanor and criminal prosecutions under the act were the particular actions of the officers of the State that the appellees prayed to be enjoined.

After a consideration of the pleadings and argument the court, consisting of three judges, expressed the view that the statute violated the Constitution of the United States, and cited in confirmation *Alabama & N. O. Transportation Co. v. Doyle*, 210 Fed. Rep. 173; *Wm. R. Compton Co. v.*

Allen, 216 Fed. Rep. 537, and *Bracey v. Darst*, 218 Fed. Rep. 482.

The court decreed that the appellants be enjoined from instituting and prosecuting any actions, civil or criminal, against complainants (appellees) under the statute for alleged violations thereof, and from taking any proceedings for its enforcement except such as might be deemed proper by them in the criminal actions already pending.

The Sioux Falls Stock Yards Company is a Colorado corporation, having its principal place of business at the City of Denver, and the Morleys are residents and citizens of Iowa.

The Stock Yards Company was at the times mentioned in the bill engaged in building and constructing a stock yard in Sioux Falls, South Dakota, and in selling a certain amount of its capital stock for raising sufficient capital for that purpose. The Morleys, at such time, were engaged in the buying and selling of stock and especially in selling the stock of the Stock Yards Company to various farmers and other purchasers, such sales being necessary to complete the construction of the stock yard and also necessary to enable the Morleys to earn a livelihood.

Six informations were filed against appellees at the instigation of appellants for violations of the statute and it is alleged that appellees will be prosecuted immediately under such informations and will be further prosecuted.

The statute, it is alleged, is an infraction of the Fourteenth Amendment of the Constitution of the United States and imposes a burden upon and practically amounts to a prohibition of interstate commerce and hence offends the commerce clause of the Constitution of the United States; and "that it attempts to vest in and delegate to the said so-called State Securities Commission judicial powers unauthorized by law."

Against the bill appellants urge, besides asserting the validity of the statute, three defenses: (1) That com-

plainants have a plain, speedy and adequate remedy at law; (2) the suit is one against the State; (3) that the plea of the unconstitutionality of the statute was made in the criminal actions.

The three defenses are without merit. Six informations have already been filed against appellees and as many more may be brought as there may be violations of the statute, and a conviction of each may bear a fine of \$1000 or imprisonment, or both.

The suit manifestly is not one against the State, and the decree appealed from does not enjoin criminal actions commenced before the filing of the bill. We therefore pass to the merits.

A summary of the statute is all that is necessary. Its purpose as declared in its title is to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State. It creates a commission called the State Securities Commission, of which the appellants—except Hanson, who is prosecuting attorney of Turner County—are members.

Those dealing in securities—and they may be persons, corporations, co-partnerships, companies or associations, incorporated or unincorporated—shall be known, it is provided, “as a domestic investment company.” Those resident of or organized in any other State, Territory or government shall be known “as a foreign investment company.”

Certain securities are exempt from the provisions of the act and information as to those to which it applies must be furnished to the commission as follows: If the securities are of the dealer's own issue a statement must be filed with the commission showing in full detail (1) the plan upon which it proposes to transact business, (2) a copy of all contracts, stocks and bonds which it proposes to make with or sell to contributors or customers, together with a copy of its prospectus and of the proposed advertisements of its

securities; which statement shall also show its name and location and main office; (3) the names and addresses of its officers and an itemized account of its financial condition and the amount of its assets and liabilities; (4) such other information as the commission may require; (5) if a foreign corporation, a copy of the law under which it was incorporated; (6) a copy of its charter and certain other papers relating to its constitution and organization. A filing fee is provided for of not less than \$10 nor more than \$100. The described papers are to be verified and, if of record, certified to. If a foreign corporation, the applicant must file its irrevocable consent to suits against it by service of summons upon the public examiner.

The commission is authorized to require further information than that mentioned above and to make an appraisal of the property of the applicant at the expense of the applicant.

If the commission find from the statements filed and the reports of the investigations conducted by it that the securities or investment contracts offered for sale would in its opinion work a fraud upon the purchaser, the commission shall disapprove of their sale and notify the company by registered mail of its findings and disapproval, and it shall be unlawful for the company to sell such securities and they shall not be sold in the State. If, however, the proposed plan of business and the securities are not of that character their sale shall be approved and a certificate issued of permission to sell.

The person who is authorized to sell the securities designated in the act is termed a "dealer" in them, and he shall not sell or offer them for sale until he shall have filed a list of the same in the office of the commission. The term "dealer," it is provided, shall not include an owner nor issuer of securities when the sale of them is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created

by law lawfully sells securities "impressed with such trust." A "dealer" is required to furnish practically the same information as that required of corporations. All authorized agents of a "dealer" or investment company shall be registered with the commission and if the "dealer" be a nonresident or a corporation other than a domestic corporation he shall at the time he registers with the commission file with it a written, duly authenticated appointment of the public examiner of the State as his or its agent in the State upon whom process or pleadings may be served for or on behalf of the "dealer," which appointment shall be irrevocable. Upon compliance with the terms of the act the commission shall issue to such "dealer" a license which shall be good until revoked by the commission for good cause upon notice to the "dealer" and after a hearing duly had.

There is a provision for keeping accounts, payment of fines and other details, and it is provided that if, after permission has been issued authorizing the sale of the designated securities it shall be made to appear to the commission from an examination of an investment company that the further sale of the securities would work a fraud upon the purchaser, the commission may make an order revoking the license of the company and, pending the hearing, suspend the right of the company.

It is unlawful for a dealer or investment company to sell or offer for sale securities other than those approved by the commission or to transact business on any other plan than that set forth in the statements and papers required to be filed with the commission; or to circulate advertisements or other documents in the State differing in any way from the copy filed with the commission; or until the same has been approved by the commission. And no dealer shall sell or offer for sale securities of an investment company until such company has complied with the act. He may, however, if such investment company has not

itself complied with the act, make application for a license.

Records of the commission shall be public records and they shall be so arranged and preserved as to facilitate their examination, except that the commission may in its discretion withhold information relating to the private affairs of persons or corporations when in its judgment the same shall not be required for the public welfare, or any information relative to any matter that may be at issue in any court, unless upon an order of the court. Except as so provided the commission may furnish to those who may apply therefor any information regarding any investment company or its affairs.

Annual statements are required to be filed by investment companies, domestic or foreign, in such form and containing such information as the commission may demand; and failure to do so forfeits its permit.

The Supreme Court of the State upon petition of any person aggrieved may review by certiorari any final order or determination of the commission. The issue of the writ shall not, however, unless specifically ordered by the court, operate as a stay of proceedings.

Violations of the act are made misdemeanors punishable by a fine of not more than \$1000 or imprisonment for not more than one year, or both fine and imprisonment. And it is provided that if any section of the act be declared unconstitutional or unauthorized the other sections shall not be vacated thereby.

The statute of South Dakota differs in some details from the statute of Ohio, but in its purpose and general provisions it is the same. There is urged against it, as was urged against the Ohio statute, that it violates the Fourteenth Amendment and the commerce clause of the Constitution of the United States. The argument to support these contentions, while affluent in citation of cases, is not so circumstantial as that which is presented against

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the Michigan statute. Therefore, we shall rest this case upon our opinion in Nos. 438, 439 and 440, reserving to the Michigan case our reply to the more specific objections.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE McREYNOLDS dissents.

CALDWELL, AS ATTORNEY GENERAL FOR THE
STATE OF SOUTH DAKOTA AND *EX OFFICIO*
MEMBER OF THE STATE SECURITIES COM-
MISSION OF THE STATE OF SOUTH DAKOTA,
ET AL. *v.* SIOUX FALLS STOCK YARDS COM-
PANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH DAKOTA.

No. 386. Argued October 16, 17, 1916.—Decided January 22, 1917.

The South Dakota "Blue Sky Law," Laws of 1915, c. 275, is the same in principle as the laws of Ohio and Michigan involved in *Hall v. Geiger-Jones Co.*, *ante*, 539, and *Merrick v. Halsey & Co.*, *post*, 568, and is sustained over constitutional objections, for the reasons assigned in those cases, as applied to a Colorado corporation seeking to raise capital by sales of its own shares, and to individuals dealing in such shares.

When a statute regulating complainant's business is alleged to be un-